

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-2062

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

B
P/S

INTERSTATE COMMERCE COMMISSION,)
Plaintiff-Appellee,)
and)
ETHAN ALLEN, INC., VERMONT PUBLIC)
SERVICE BOARD and NEW HAMPSHIRE) No. 74-2062
PUBLIC UTILITIES COMMISSION,
Intervenors)
vs.)
MAINE CENTRAL RAILROAD COMPANY)
Defendant-Appellant.)

On Appeal From The United States District Court
For The District of Vermont

BRIEF FOR APPELLANT MAINE CENTRAL RAILROAD COMPANY

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BRIEF FOR APPELLANT

DECISION BELOW

On July 18, 1974, the United States District Court for the District of Vermont, Coffrin, J., granted a mandatory injunction requiring appellant Maine Central Railroad Company to repair and restore service on its railroad line between North Stratford, New Hampshire, and Beecher Falls, Vermont. (The District Court's unpublished Opinion and Order is appended to this Brief as an attachment. Citations to the Opinion and Order are denoted "(Op.).")

On August 8, 1974, the court below denied Maine Central's motion for stay pending appeal.

QUESTIONS PRESENTED

- 1) Whether a railroad illegally intends permanent "abandonment" of a line under Sections 1(18) and 1(20) of

the Interstate Commerce Act, 49 U.S.C. §§ 1(18) and 1(20), where, after severe floods rendering the line unusable, the railroad elects not to make necessary repairs until after the Interstate Commerce Commission has ruled on a pending petition to abandon the line.

2) Whether the court below erred in granting a mandatory injunction directing restoration of service on a railroad line on the view that (a) the Interstate Commerce Commission had no other means of securing a restoration of service, and (b) the court could not properly permit the Interstate Commerce Commission to consider the issues in the first instance.

3) Whether the court below committed an abuse of discretion in granting sweeping mandatory injunctive relief where: (a) the ICC inexcusably delayed processing the pending abandonment petition for more than a year and fail to take any administrative action within its authority to determine the propriety of suspension of service; (b) the ICC has itself conceded probable grant of the pending abandonment petition in the near future, rendering the controversy moot; (c) the court found no public interest factors justifying grant of an injunction; and (d) the only private party alleging injury from the suspension of service has asserted an adequate remedy at law.

STATEMENT OF THE CASE

Between June 26 and July 3, 1973, devastating floods
^{1/} struck areas of the States of Vermont and New Hampshire.^{1/}

Appellant Maine Central Railroad Company, a common carrier by railroad subject to Part I of the Interstate Commerce Act, 49 U.S.C. §§1, et seq., suffered extensive damage to railroad lines it operates in upper New England.

Among the damaged lines was a branch railroad line between Quebec Junction, New Hampshire, and Beecher Falls, Vermont (the "Beecher Falls Branch"). This 57.22-mile segment of track sustained especially severe damage to culverts, ballast, rails and ties; and several bridges -- including a 54-foot through girder bridge -- were destroyed because the 22.96-mile segment at the terminus of the branch was entirely unsafe and impassable, Maine Central declared an embargo on all traffic originated on or destined for points on this deadend segment of the branch between North Stratford, New Hampshire, and Beecher Falls on July 3, 1973. It amended the embargo in minor respects on July 13, 1973.

^{1/} As a result of these floods, the President declared Vermont a disaster area, and both Congress (P.L. 91-606) and the Vermont legislature (Vermont Acts of 1974, No. 229), have appropriated millions of dollars for disaster relief.

Before the floods, the Beecher Falls Branch track and roadbed were in good condition, allowing for full, efficient operations. (Op. 6.) But because of the unprofitability of operations stemming from the light density of traffic originated on and destined for points on the entire Beecher Falls Branch,^{2/} Maine Central's Board of Directors had voted on June 27, 1973 -- before the flood -- to petition the Interstate Commerce Commission for approval to abandon the entire 57.52-mile Beecher Falls Branch. On July 19, 1973, Maine Central submitted to the ICC its "long-form" petition for abandonment of the 57.52-mile line of track between Quebec Junction, New Hampshire, and Beecher Falls, Vermont, including the 22.96-mile segment covered by the embargo. The Commission accepted the petition on July 24, 1973. (Op. 4.)^{3/}

Conservative cost estimates for repair of the embargoed segment exceeded \$50,000 in July 1973 prices. (Op. 6.) Though Maine Central would have continued operations on the embargoed segment pending approval of its abandonment

^{2/} The unprofitability of operations was assured when, in early 1973, one of the two remaining shippers on the Beecher Falls Branch, the St. Regis Paper Company, announced its intention to terminate operations. St. Regis has done so. (Op. 3.)

^{3/} The Department of Transportation, pursuant to the Regional Rail Reorganization Act of 1973, has designated the

(cont'd)

petition had the segment not been damaged by the floods
4/
(Tr. 210), it did not undertake to make the repairs while
its abandonment petition was pending.

The only remaining shipper on the embargoed segment, intervenor-appellee Ethan Allen, Inc., filed a protest with the ICC opposing Maine Central's abandonment petition on September 11, 1973; the State of New Hampshire (in which all but several miles of the embargoed segment are located) filed a similar protest. In the district court, there was conflicting testimony about whether Ethan Allen had offered to defray certain costs associated with restoring the segment to service; Maine Central denied that it received such an offer. Since Ethan Allen offered in open court to contribute some funds, the district court did not deem it necessary to determine whether such an offer had previously been made. (Op. 7.) Meanwhile, the Interstate Commerce Commission took no action on Maine Central's abandonment

(cont'd)

Beecher Falls Branch as "excess;" this reflects the Department's determination that the Branch does not generate sufficient traffic to justify the continuance of rail service.

4/
Citations to the transcript of the hearing before the district court are denoted in the form "(Tr. .)."

petition. The Commission, moreover, did not exercise its power to inquire into the legality of the embargo of part of the Beecher Falls Branch, and to annul the embargo if it were found to be illegal.

The Proceedings Below

These proceedings were initiated on March 20, 1974, when the ICC filed a complaint for injunctive relief in the United States District Court for the District of Vermont. The complaint alleged that Maine Central had unlawfully abandoned the embargoed segment and sought a mandatory injunction under Sections 1(18) and 1(20) of the Interstate Commerce Act compelling Maine Central not to continue its embargo "until it shall first have obtained from the Interstate Commerce Commission a certificate . . . [permitting] such abandonment." Ethan Allen, New Hampshire and Vermont intervened as parties plaintiff.

The district court held hearings in May and June 1974. On July 18, 1974, the district court denied Maine Central's motion to dismiss the complaint and granted a mandatory injunction requiring Maine Central to restore the embargoed segment to service. Finding (1) that Maine Central had illegally abandoned the Branch (Op. 11-13), (2) that "the only mechanism that the Commission has to prevent an unlawful abandonment" is an action for injunction under

49 U.S.C. § 1(20) (Op. 8), and (3) that Ethan Allen's reliance upon continued rail service (Op. 13) called for equitable relief despite the ICC's unreasonable delay in processing the abandonment petition (Op. 11),^{5/} the court ordered Maine Central "to immediately proceed to restore rail service." (Op. 14)

On July 26, 1974, Maine Central filed a notice of appeal with this Court, and moved the district court for a stay of the district court's order. After hearing, the district court denied the motion for stay pending appeal on August 8, 1974. Maine Central filed a motion for stay pending appeal with this court on August 16, 1974. At a hearing on the motion on September 10, 1974, the court ordered this appeal expedited.

^{5/} The district court refused to consider the likelihood that the Commission would grant the abandonment petition. (Op. 14.) Maine Central had adduced evidence on this point and showed that under the ICC's recently enacted abandonment rules, Maine Central would be entitled to a presumption that abandonment would be proper under the "34-Car Rule." Under this guideline, a segment of track generating fewer than 34 revenue carloads per mile annually qualifies for a rebuttable presumption that abandonment should be approved. See 49 C.F.R. § 1121.20 (1974); Commonwealth of Pennsylvania v. United States, 361 F. Supp. 208 (M.D.Pa. 1973) (three-judge court). Though counsel for the ICC has argued that in this case the "34-Car Rule" should be computed on the basis of the 22.96-mile embargoed segment, it is plain that the Commission would take into account the full 57.52 miles covered by the abandonment petition. Under the latter approach, the abandonment petition indisputably enjoys the "34-Car Rule" presumption.

ARGUMENT

Introduction

Only the ICC's indefensible delay in processing Maine Central's abandonment petition accounts for this litigation. In the court below, the ICC conceded that abandonment applications have traditionally been processed within four to six months. But while the ICC resisted implementation of this Court's decision in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.) cert. denied, 404 US 849 (1972), it suspended processing all abandonment petitions until this Court's mandate issued in Harlem Valley Transportation Assn. v. Stafford, No. 73-2496 (2d Cir., June 18, 1974). Maine Central's abandonment petition -- filed more than fourteen months ago -- is one of more than three hundred delayed by the Commission's ill-conceived policy of resisting the plain meaning of NEPA.^{6/}

To begin with, the ICC's remarkable delay upset a standard assumption of those in the railroad industry -- that petitions for minor abandonments are granted within

^{6/} "Not an inconsequential part of the delay in the ICC processes lies not so much in the application of NEPA to abandonment applications but in the ICC's refusal to recognize that NEPA requirements do apply." ICC v. Chicago, Rock Island & Pacific R. Co., No. 73-1920 (8 Cir., July 24, 1974), slip op. at 16 n.7.

120-180 days. Proceeding on this assumption, Maine Central did not restore the damaged line to service, in order to forego an expense apt to prove needless were the abandonment petition properly processed. Eight months passed without any communication from the Commission. Then the ICC filed this suit. Entirely on the basis of the delay, and Maine Central's financial ability to absorb the expenses of operating the damaged line, the district court inferred an illegal "abandonment" and ordered Maine Central to restore service. The court below accordingly erred: it did not and could not find that Maine Central voluntarily ceased operations, for the floods had compelled cessation of service. It did not and could not find that Maine Central intended that its cessation of service be permanent, for the railroad took the only sensible course of action -- delaying the restoration of service until the ICC passed on its abandonment petition. There was, therefore, no "abandonment" within the meaning of the Interstate Commerce Act.

The district court also erred in determining that its exercise of extraordinary equitable powers offered the only possible solution to the impasse that the ICC had created through its own unreasonable delay. The plain fact is that the ICC has the power, which in other cases it has freely exercised, to order the withdrawal of an embargo. The district court's belief that only the court itself could

act -- and its misconception that no court is permitted as a matter of law to defer to agency proceedings when a moving party has alleged an illegal embargo -- was fundamental error. Had the court below entertained the correct view of the Commission's power to annul embargoes and of the discretionary character of primary jurisdiction, it might never have elected to order such sweeping relief. The district court's erroneous assumptions, which influenced its ultimate judgment, call for a remand.

Finally, the district court's order offends any proper view of the equities. The ICC's delay in processing Maine Central's abandonment petition -- coupled with its abrupt institution of these proceedings after eight months of utter silence and apparent indifference -- is astonishing. The Commission made no attempt, formal or informal, to apply its expertise and authority to the issues, and communicated with Maine Central for the first time in its complaint for injunctive relief. Neither the record nor the district court's findings, moreover, warrant the grant of mandatory relief. Neither contain a shred of public interest justification, and the one shipper inconvenienced by the cessation of service showed only a likelihood of slight unquantified increases in operating costs, but no likelihood of reduced production, layoffs, or cancellation of planned expansion. That same shipper has also stated in its complaint an action for damages against Maine Central that,

should it prevail, would be an entirely adequate remedy.

Maine Central, by contrast, has been and threatens even more gravely to be irreparably harmed by the mandatory injunctive relief. It has already begun to make repairs to the damaged line, repairs that draw on the railroad's limited equipment and manpower, repairs that will probably prove to have been needless in any event. It goes without saying that repair efforts to restore the embargoed line are at the expense of maintaining other Maine Central lines; money lost in the operation of the embargoed line cannot be spent to maintain right-of-way and equipment that should command a higher priority if the public is best to be served. The district court weighed none of these factors.

I. MAINE CENTRAL DID NOT "ABANDON" THE EMBARGOED SEGMENT.

The district court based its conclusion that Maine Central "abandoned" the embargoed segment on two factors:

(1) "the extremely lengthy period of discontinuation of service in this case;" and (2) "the clear financial and physical ability of the railroad to repair the damage and resume service." (Op. 12.) The findings supporting the district court's conclusion forcefully point out its error in assuming that Sections 1(18) and 1(20) of the Interstate

^{7/} Commerce Act place an affirmative, judicially enforceable, duty on rail carriers to repair damaged lines as rapidly as is feasible.

The "abandonment" provisions of the Act are not so broad as to trigger judicial action at every instance of protracted and involuntary service interruption, and the cases confirm this principle. The term "abandonment" means "to give up permanently, not merely to suspend operations."

Meyers v. Arkansas & Ozarks Ry. Corp., 185 F.Supp. 36, 41 (W.D.Ark. 1960); see also, Zirn v. Hanover Bank, 215 F.2d 63, 69 (2d Cir. 1954). "Abandonment" is nowhere defined in the Interstate Commerce Act, and the courts have therefore construed the term in its customary legal sense. Accordingly, there is not an abandonment where the service cessation is not voluntary:

"Abandonment involves more than mere nonuser. There must be an intention on the part of the company to abandon."
Williams v. Atlantic Coast Line R. Co., 17 F.2d 17, 22 (4th Cir. 1927).

^{7/} 49 U.S.C. § 1(18) provides in pertinent part that: "No carrier by railroad . . . shall abandon all or any portion of a line of railroad or operation thereof, unless there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity justify such abandonment."

49 U.S.C. § 1(20) provides in pertinent part that: Any . . . abandonment contrary to the provisions of [§ 1(18)] may be enjoined by any court of competent jurisdiction.

In enacting Sections 1(18) and 1(20) of the Act, Congress did not aim to create an equitable alternative to a shipper's common law right of action for damages against a common carrier that has unreasonably refused to provide service; neither did Congress intend to provide an equitable alternative to the Commission's power to annul embargoes or award reparations for carrier refusals to provide service. See Asbury v. Chesapeake & Ohio Ry. Co., 314 F. Supp. 310 (D.D.C. 1970). Instead, Congress narrowly aimed to empower the courts to restrain intentional abandonments or actions that would have the effect of making the restoration of service impossible, such as the tearing up of track. Accordingly,

"Abandonment does not mean a partial disuse with an intention to complete it upon a contingency. It means a final relinquishment or giving up without intention of resuming."
Wheeling & L.E. Ry. Co. v. Pittsburgh & W.V. Ry. Co., 33 F.2d 390, 392 (6 Cir. 1929).

The district court found it unnecessary to inquire into Maine Central's intentions, and therefore could not properly have concluded that there was an abandonment. Indeed, the opinion and the record clearly show that had it not been for the floods, Maine Central would have continued operations on the embargoed segment. (Tr. 210.) Unlike the situation in ICC v. Chicago, Rock Island & Pacific

Railroad Co., No. 73-1920 (8 Cir., decided July 24, 1974), the district court found that Maine Central has not allowed deferred maintenance to threaten the destruction of the embargoed segment, and thus no intent to abandon could be inferred from Maine Central's actions prior to the floods. Maine Central has not taken any action threatening its ability to restore the embargoed segment to service.

Under all the circumstances, Maine Central's actions have been entirely reasonable and proper. It is undisputed that an Act of God compelled the cessation of service on the damaged lines, and Maine Central properly declared an embargo, an interim measure that is time-honored in railroad practice. See Asbury v. Chesapeake & Ohio Ry. Co., 314 F.Supp. 310, 312 (D.D.C. 1970); New York Central R.R. Co. v. United States, 201 F.Supp. 958 (S.D.N.Y. 1962) (three-judge court); Smith v. United States, 211 F.Supp. 66, 69 (D.Conn. 1962). Since Maine Central's Board of Directors had voted before the floods to petition for abandonment of the branch line that includes the embargoed segment, Maine Central elected not to restore the segment unless the Commission took the unlikely step of denying the petition. Such a conditional suspension of service, in the absence of any finding of intent permanently to abandon a line or to permit its destruction, is not an "abandonment"

8/
within the meaning of the Interstate Commerce Act. To hold otherwise is to empower the courts to exercise functions far beyond the limited power to prevent abandonments granted by Section 1(20) of the Act.

II. THE DISTRICT COURT BASED ITS ORDER ON MISCONCEPTIONS CONCERNING THE ADMINISTRATIVE POWERS OF THE ICC AND THE DOCTRINE OF PRIMARY JURISDICTION.

We believe that the district court's finding of an abandonment was wrong. But even were we incorrect in concluding that Maine Central properly announced and maintained its embargo pending the Commission's long-delayed disposition of the abandonment petition, the district court's order should still be reversed on account of two erroneous assumptions that are its basis.

Though the district court recognized that railroads may properly declare embargoes when it is not possible for them to provide transportation service (Op. 3), it concluded that in an action alleging an illegal "abandonment" there could be no legal warrant for encouraging the exercise by

8/ Distinguishable, of course, is a purely voluntary cessation of service, initiated by the carrier, and contingent upon the carrier's own disposition in the future. In *Myers v. Jay Street Connecting Railroad*, 259 F.2d 532 (2d Cir. 1958), for example, the railroad simply ceased operations on the open-ended condition that if it deemed itself financially able, it might eventually restore service. Maine Central, by contrast, had no control over the floods that destroyed the embargoed segment and will definitely restore service if its long-pending abandonment petition is finally denied.

the ICC of its administrative judgment. Since the court concluded that time had transformed Maine Central's legal embargo into an illegal abandonment, it held that it could not defer to the ICC's primary jurisdiction. (Op. 9-10.) The court was fortified in its judgment by the view that "the only mechanism that the Commission has to prevent an unlawful abandonment . . . is contained in 49 U.S.C. § 1(20)." (Op. 8.)

While the ICC is entitled under Section 1(20) to seek injunctive relief to terminate an abandonment, it unquestionably had the long-recognized power, unexercised in this case, "to issue an order annulling the embargo." New York Central Railroad Co. v. United States, 201 F. Supp. 958, 959 (S.D.N.Y. 1962) (unanimous three-judge court), vacated as moot, 371 U.S. 805 (1962); Asbury v. Chesapeake & Ohio Ry. Co., 314 F. Supp. 310, 314 (D.D.C. 1970). Under 49 U.S.C. § 13(2), the ICC is empowered to initiate inquiries and to make and enforce orders compelling compliance with the provisions of the Interstate Commerce Act; among those provisions are 49 U.S.C. §§ 1(4) and 1(6), which forbid, respectively, refusals to furnish transportation upon reasonable request, and unjust and unreasonable practices. The Commission has, in fact, ordered carriers to suspend embargoes and resume service on damaged or obstructed lines. See, e.g., Commonwealth

of Pennsylvania v. Penn Central Transportation Co., 348 F. Supp. 28, 30 (M.D.Pa. 1972), aff'd, 475 F.2d 1394 (3 Cir. 1973); ICC v. St. Johnsbury & L.C. Railroad, Civil Action No. 73-3 (D.Ver., decided January 31, 1973).

In the most technical of senses, the district court was correct in its statement that "while the validity of embargoes may be within the special competence of the ICC . . . the statutory scheme places illegal abandonment within the special competence of the courts." (Op. 9.) This logic-chopping conclusion, however, begs the subtle and often difficult questions attending the proper allocation of administrative and judicial responsibilities. Resort to administrative agencies in the first instance -- "primary jurisdiction" -- is not a formalistic doctrine calling for the strict separation of legal and "factual" questions, but a vehicle for "coordinated action . . . in the attainment of the common aim." United States v. Morgan, 307 U.S. 183, 191 (1939); Far East Conference v. United States, 342 U.S. 570, 575 (1952). As professor Davis aptly points out, the doctrine of primary jurisdiction is one of flexible accommodation, designed "merely to determine which tribunal shall make the initial decision and not which shall make the final decision." Davis, 3 Administrative Law Treatise § 19.01 pp. 4-5. Thus, "[w]hen there is a basis for judicial action, independent of agency proceedings,

courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1970) (emphasis added). In its view that primary jurisdiction was necessarily foreclosed by the "legal" stance of the case, the district court erred.

There is much that the ICC could have contributed to resolution of this case had it not kept complete silence for eight months before filing suit. It might have annulled the embargo, forcing resumption of service and/or eliminating all doubt about the propriety of Maine Central's actions. See Commonwealth of Pennsylvania v. Penn Central Transportation Co., supra; ICC v. St. Johnsbury & L.C. Railroad, supra. It could have speeded processing of the abandonment petition, either approving it or, by denying it, put Maine Central to the test of its intentions with respect to resuming operations or abandoning the line. Had the ICC approached Maine Central formally or informally before filing suit, it might have been possible to arrange for substitute service pending decision on the merits of the abandonment petition. See, e.g., Chamber of Commerce of Demopolis v. Southern Ry. Co., 206 I.C.C. 70 (1934).

In any event, it is plain that the ICC was and is not powerless to promote resolution of the case. It is equally clear that primary jurisdiction was and is not foreclosed as a matter of law. Had the district court entertained a proper view of the Commission's powers and the role of primary jurisdiction, it might well have reached a different result. This strong possibility calls for a remand.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN BALANCING THE EQUITIES.

On September 13, 1974, ICC Commissioner Tuggle issued Order AB 83, finding that Maine Central's proposed abandonment of the Beecher Falls Branch (including the embargoed segment) involves no environmental impact requiring the preparation of an impact statement. (A copy of Commissioner Tuggle's order and its accompanying environmental survey and related documents is appended to this Brief as an attachment.) Thus, after a delay of fourteen months, action on Maine Central's abandonment petition appears imminent. During the hearings before the district court in May, counsel for the ICC estimated that Maine Central's abandonment petition would be processed approximately four months after a decision in the Harlem Valley case (Tr. 39); his prediction -- which seems to have been borne out by events -- would indicate that the ICC should rule on the petition in October.

We have already described the ways in which the ICC's indefensible and inequitable delays have accounted for this needless litigation; even the district court sharply criticized the Commission and adverted to the "irrationality of any expenditure of funds for a rail line whose termination may be imminent." (Op. 10-11.) For other courts, the simple fact that an abandonment petition is pending has been enough to warrant denial of mandatory relief requiring possible "improvident" expenditures. See Asbury v. Chesapeake & Ohio Ry. Co., 264 F.Supp. 437, 438 (D.D.C. 1967); ICC v. Chicago, Rock Island & Pacific R. Co., No. 73-1920 (8 Cir., July 24, 1974), slip op. at 14. In this case, the far greater equities favoring Maine Central, especially in light of the ICC's inequitable conduct, should have compelled denial of mandatory relief.

In the first place, the district court did not and could not find that the public interest rested on the restoration of service. That the court's opinion does not include findings on the subject simply reflects the fact that at the hearings, the ICC failed completely in its attempt to show that suspension of rail service had or would cause unemployment, cancellation of expansion plans, or any other injury to the public interest. The best that the ICC could elicit from representatives of Ethan Allen, the sole remaining shipper on the line, was that the service suspension

would probably have an adverse impact on the company's costs. Ethan Allen's President indicated that the suspension might deter future expansion in Beecher Falls, but pointed to no plans for expansion (Tr. 111-113); he conceded, moreover, that the Beecher Falls plant is already "over-expanded." (Tr. 113.) There is no evidence in the record that Ethan Allen intends to lay off any employees as a result of the service suspension, nor any that Ethan Allen has curtailed production or plans to do so.^{9/}

In the absence of public interest justification for mandatory relief, the district court based its order on Ethan Allen's past reliance on rail service and the "serious impact" which a service suspension could have. (Op. 13.) But the court made no findings whatever concerning the extent of the supposed "serious impact," and the only explanatory clue appearing in the opinion is the statement that "[t]here was testimony" to the effect that Ethan Allen's annual costs could be increased by slightly more than \$100,000 a year if railroad service were discontinued. (Op. 6.)

^{9/} New Hampshire's protest to Maine Central's abandonment petition expressed only the concern that rail service be provided to Groveton, New Hampshire. Maine Central arranged for such service by guaranteeing that the bankrupt Boston & Maine would provide such service, which is now in effect. Subsequently, New Hampshire, like Vermont, has expressed the view that the public interest stakes of this case rest upon the effect the service suspension has on Ethan Allen, and those who work for Ethan Allen.

It is not surprising that the district court did not make any findings of fact concerning Ethan Allen's injury, for no representative of the company was able to substantiate the loss estimates, which were discredited at the hearings. (Tr. 69-101; 101-103.) Ethan Allen, moreover, has alleged damages in its complaint and there has been no showing why damages, if proper, would not be a fully adequate remedy.

Under these circumstances, we believe that there was no proper basis for the grant of such sweeping mandatory relief. The decision as to whether the injunction should issue properly depended upon the answer to the question, "Where lies the public interest?" Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921, 926 (D.C.Cir. 1958). The district court erred in refusing to weigh at all the likelihood that the abandonment petition would be granted, and in declining to consider the importance of the embargoed segment. (Op. 14.) See ICC v. Chicago, Rock Island & Pacific R. Co., No. 73-1920 (8 Cir., July 24, 1974), slip op. at 9 n.⁴.^{10/} We believe that the answer to the public interest question is clear, and all the more so in the absence of any findings respecting irreparable injury to Ethan Allen: the public interest cannot require a railroad that has in good faith awaited the ICC's action on a petition to abandon a damaged, marginal branch line, to restore that line when approval of the petition appears imminent.

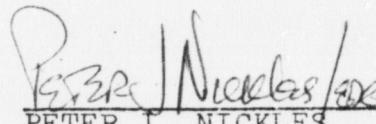
^{10/}See also, Commonwealth of Pennsylvania v. Penn Central Transp. Co., 348 F.Supp. 28, 30 (M.D.Pa. 1972), aff'd, 475 F.2d 1396 (3d Cir.1973).

By definition, the application of Maine Central's manpower and equipment to a pair of the embargoed segment precludes maintenance of other lines that are not marginal. For these reasons, the district court committed an abuse of discretion in directing Maine Central to restore the embargoed segment to service.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and its order vacated.

Respectfully submitted,


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September 14, 1974

Attorneys for
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COPY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Interstate Commerce Commission :
and :
Ethan Allen, Inc., Vermont Public Service Board and New Hampshire Public Utilities Commission, Intervenors : Civil Action File No. 74-81
v.
Maine Central Railroad Company and L. Spencer Miller.

OPINION AND ORDER

I. Procedural Background and Rulings of Trial Court

This civil action, commenced by the Interstate Commerce Commission on March 20, 1974, seeks injunctive relief against the defendant, Maine Central Railroad Company, restraining it from alleged illegal abandonment of a certain segment of its track in the States of New Hampshire and Vermont. Shortly after the commencement of this action, the Public Service Board of the State of Vermont, Ethan Allen, Inc., and the Public Utilities Commission of the State of New Hampshire moved to intervene in this action, which motions were granted. From the hearings held on this matter on May 21, May 22 and June 7, 1974, the following facts appear:

The Maine Central Railroad Company (Maine Central), one of the relatively few financially solvent railroads in the Northeastern United States, is a carrier subject to the Interstate Commerce Act, 49 U.S.C. § 1, et seq. Through outright ownership and trackage agreements with the Boston

and Maine and Canadian National Railway, it operates a 57.52 mile rail line from Quebec Junction in Carroll, New Hampshire, to Beecher Falls, Vermont. This line has been divided by the Maine Central into four segments, the fourth segment being the so-called Beecher Falls branch, a 22.96 mile dead-end stretch owned by the Maine Central which runs from North Stratford, New Hampshire, to Beecher Falls, Vermont. All but approximately 1.5 miles of the track is located in New Hampshire with the remaining one and one-half mile segment located in Vermont.

Prior to June 30, 1973, the Railroad's principal customers on the Beecher Falls branch were Ethan Allen, Inc., a furniture manufacturer, and the Woodland Division of the St. Regis Paper Company, a pulpwood processor. On June 30, 1973, the St. Regis Company discontinued operations at its Beecher Falls facility. St. Regis' carloadings for the year 1971 and 1972 accounted for between 20 and 21 percent of the total carloadings on the line. In the first quarter of 1973, the carloadings attributable to St. Regis were 38 percent of the total carloadings on the branch. However, this increased traffic was related to the termination of St. Regis' operations.

On June 29, 30 and July 1, 1973, heavy rains and concomitant flooding occurred in New Hampshire and Vermont which caused damage to segments of the Maine Central's trackage on the Beecher Falls branch from North Stratford, New Hampshire, to Beecher Falls, Vermont. Most of the damaged track was located in the State of New Hampshire. As a result of the flood damage, on July 3, 1973 the Maine

Central published a so-called embargo notice in the Association of American Railroads daily communications newsletter, ceasing all rail service on the Beecher Falls branch from North Stratford, New Hampshire, to Beecher Falls, Vermont. The stated reason for the embargo was "damage to track structure from High Water." In the railroad industry an embargo notice is the customary manner of ceasing rail service due to labor problems, traffic congestion, unforeseen physical damage to track or equipment or other similar phenomena which make continued rail service over the described trackage impossible. Prior ICC approval to file an embargo notice is not required.

The embargo notice filed by the Maine Central on July 3, 1973 was modified in minor detail on July 13, 1973 but it has not been lifted or significantly altered since its issuance on July 3, 1973. Neither has the damage caused by the flood been repaired. Consequently, no rail service has been provided on the branch from North Stratford, New Hampshire, to Beecher Falls, Vermont, since before the flooding of late June and early July, 1973.

Prior to the flood the Maine Central had under active consideration an abandonment of the entire 57.52 mile segment of track from Quebec Junction to Beecher Falls. The St. Regis Paper Company had notified the Railroad in the early part of 1973 of its decision to terminate its operations in Beecher Falls effective the end of June, 1973. This fact, plus the pre-existing business and profitability of the entire line which the Railroad's President, E. Spencer Miller, described as "marginal and of light density" precipitated

consideration of abandonment. On June 27, 1973, Miller made a report emphasizing these facts to the Maine Central's Board of Directors of which he is the Chairman and the Board voted to take the necessary steps to secure approval from the ICC to abandon the entire 57.52 mile line. Miller testified that it was the Maine Central's intent on June 27, 1973 to continue to operate this line until the matter of abandonment was resolved by the ICC.

On July 19, 1973 the Railroad completed its "long form" petition to abandon the entire line and filed it with the ICC which received it on July 24, 1973. No official action has been taken by the Commission on this Petition to Abandon and with the exception of several telephone conversations and an informal conference between officials of the Maine Central and the ICC; there has been no communication between the Railroad and the Commission on the application. Counsel for the Commission represented that although abandonment petitions are usually decided by the Commission within six months of their filing date, the decision in Walden Valley Transportation Association v. Stafford, 360 F. Supp. 1057 (S.D.N.Y. 1973), requiring an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. §§ 4321-7, to be prepared by the Commission as a condition precedent to approving an abandonment petition has delayed the Commission's decision in the matter of the Maine Central's Petition. The case which was on appeal to the United States Court of Appeals for the Second Circuit as of the date of the hearing in this matter has subsequently been decided.

On July 2, 1973, shortly after the floods subsided, the Maine Central's Chief Engineer and its track engineer made an inspection trip over the trackage from North Stratford, New Hampshire, to Beecher Falls, Vermont, for the purpose of determining the extent of the flood damage. They reported on July 3, 1973 that damage had been caused to three bridges and the roadbed in a four mile area beginning approximately three miles from North Stratford, New Hampshire, and ending seven miles from North Stratford toward Beecher Falls. Miscellaneous small washouts totalling approximately 200 yards occurred in Vermont. At this time, it was estimated that it would cost approximately \$21,000 to \$29,000 and take eight to ten working days to take corrective action, make necessary repairs and restore the New Hampshire trackage on this branch to the condition in which it existed just prior to the flood. This figure did not include an estimated \$1,000 of damage to Vermont trackage on the branch. A summary of the damage was included in the abandonment petition filed with the ICC in which the Railroad stated "A preliminary estimate of the expense of repairing damages to this segment of line [the Beecher Falls branch] is \$30,000."

The Railroad's Chief Engineer testified that this \$30,000 figure included only labor and material and did not take into consideration a surcharge for accounting costs, the use of repair equipment and supervisory personnel. An updated repair figure was made as of January 11, 1974 including the above enumerated items which, in the Railroad's

estimate, increased the cost of restoring the track to its pre-flood condition at \$52,000. Neither the \$30,000 figure nor the \$52,000 figure take into consideration the cost of deferred maintenance on the line nor the cost of normal periodic maintenance.

Both the locomotive engineer and trainman who operated the equipment on this branch line testified that prior to June 30, 1973, the roadbed and track was in good condition and the train was able to negotiate this branch at its posted bulletin speed of approximately 20-25 miles per hour. There was also testimony that in the past ten years of operation there were very few derailments or other mishaps in negotiating this line and those which did occur were due to rails spreading or twisted rails caused by solar heat.

Upon the cessation of business by St. Regis Paper Company, Ethan Allen became the principal and probably only customer on the Beecher Falls branch. Prior to June 30, 1973, the predominant portion of Ethan Allen's transportation requirements were fulfilled by the Maine Central, with only local, short-distance shipments being carried by other means of transportation. There was testimony that whereas it cost Ethan Allen approximately \$87,700 in 1972 to ship via the Maine Central, the same traffic by necessity is now transported by truck at a cost of \$193,000 which includes additional labor, handling, damage and truck leasing. Furthermore, Ethan Allen's Beecher Falls facility was specifically designed for product shipment by rail. Among its other features, the plant has a 700 foot rail siding installed in 1964 at the Company's own expense and an indoor loading area that can

accommodate nine railroad cars. Because of its dependence on rail transportation, Ethan Allen decided in the latter part of 1973 to offer the Maine Central the sum of \$30,000 to restore rail service to the Beecher Falls line. The \$30,000 figure was derived from the Railroad's estimate of damages contained in its abandonment application to the ICC. This offer was not directly communicated to the Maine Central, but rather was made to the Deputy Commissioner of the Vermont Public Service Board by Ethan Allen's Attorney who evidently believed this offer was to be relayed to the Railroad by the Deputy Commissioner. Although there appears to be a conflict in the testimony as to whether this offer was actually communicated to the Railroad during the latter part of 1973 or the early part of 1974 in the same terms as it was communicated to the Vermont Public Service Board Deputy Commissioner, suffice it to say that Ethan Allen, Inc. is presently willing to assist the Railroad in repairing the flood damage to the Beecher Falls branch and at the hearing held on this matter increased its offer of assistance to \$52,000 which equals the updated repair cost figure established by the Railroad.

Although there was no testimony introduced that the Maine Central has present plans or intention of restoring service on the Beecher Falls line, the record reflects that the Railroad is neither financially nor physically unable to repair the damage caused by the flood and resume operations on the Beecher Falls branch. Indeed, the evidence before the Court indicates that the Railroad has realized a profit in the past several years of operation and has sufficient resources to effect the necessary repairs.

II. Consideration of Maine Central's
Motion to Dismiss

The Railroad contends that this Court should not exercise jurisdiction over this matter on two grounds. First, that the doctrine of primary jurisdiction requires a preliminary resort to the administrative processes of the ICC to determine the legality of the alleged abandonment of the Beecher Falls branch and second, that because the ICC has before it an abandonment petition covering the track included in the Beecher Falls branch, this Court should stay its hand pending the outcome of that administrative proceeding since an order from the ICC allowing abandonment could well render a decision by this Court meaningless and unnecessary.

The difficulty with the defendant's primary jurisdiction argument is that the essential question before us is whether the Maine Central illegally abandoned the trackage on the Beecher Falls branch contrary to the Interstate Commerce Act.

Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18) provides in pertinent part that:

No carrier by railroad . . . shall abandon all or any portion of a line of railroad or operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment. (emphasis added).

The only mechanism that the Commission has to prevent an unlawful abandonment, i.e. an abandonment before the acquisition of such a certificate, is contained in 49 U.S.C. § 1(20), the jurisdictional predicate for this action. Powell v. United States, 300 U.S. 276, 287 (1937). That section provides in pertinent part that:

Any . . . abandonment contrary to the provisions of [49 U.S.C. § 1(18)] may be enjoined by any court of competent jurisdiction

The progenitor of the primary jurisdiction doctrine, Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) indicates that the context of the federal enactment sought to be enforced must be scrutinized before any decision is made as to whether the alleged violation of the Act can be redressed by the courts without previous action by the agency to whose discretion enforcement of the Act is committed. 204 U.S. at 446.

As stated in United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956):

Primary jurisdiction . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Although under the Interstate Commerce Act legal abandonment matters and the validity of embargoes may be within the special competence of the ICC, we believe the statutory scheme of the Act places illegal abandonments within the special competence of the courts. Any expert or specialized knowledge the ICC may have concerning the transportation industry is not essential where the question is fundamentally whether an abandonment has improperly taken place prior to the issuance of the requisite Certificate of Public Convenience and Necessity provided for in 49 U.S.C. § 1(18) and not whether the abandonment is within the public interest and the policies of the Interstate Commerce Act. See Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). Furthermore, we perceive that in illegal

abandonment matters, the strong policy of "uniformity and consistency in the regulation of the business entrusted to the agency" is not a paramount factor because, as previously indicated, the agency has no authority to terminate illegal abandonments on its own but rather, pursuant to 49 U.S.C. § 1(2), must apply to the courts for relief. Powell v. United States, 300 U.S. 276, 287 (1937).

In sum, we conclude that the issues before us are not within the parameters of the doctrine of primary jurisdiction. See also ICC v. St. Johnsbury and Lamoille County R.R., Civ. 73-3 (D. Vt. filed January 31, 1973), where Judge Holden rejected as "without merit" the contention of the defendant railroad that the termination of service without an ICC certificate is a matter committed to the administrative jurisdiction of the ICC.

Defendant's second contention is also wide of the mark. A rail carrier has no right to unilaterally abandon rail service pending the administrative adjudication of an abandonment petition. Meyers v. Jay Street Connecting R.R., 259 F.2d 532, 536 (2d Cir. 1958). As the court in Meyers pointed out, there is a "strong purpose" in the Interstate Commerce Act "to prohibit the abandonment of railway service without the approval of the ICC." Id. at 536. Therefore, if the Maine Central's cessation of service from July 3, 1973 up to and including the present time constitutes an illegal abandonment within the meaning of the Act, it should not be heard to complain that the Commission was tardy in its decision on the abandonment petition. The Court is cognizant, however, of the irrationality of any expenditure

of funds for a rail line whose termination may be imminent and the Court does not look with favor upon the delay of the Commission of almost one year for whatever reason in processing an application for abandonment which normally takes approximately six months. We do not believe, however, that these considerations have such weight when viewed in contrast to the strong policy in the Act prohibiting unilateral abandonments that we should decline to remedy conduct on the part of a carrier which may be in violation of the Act.

III. The Propriety of the Maine Central's
Termination of Operations on the
Beecher Falls Branch

We note at the outset that nowhere in the Interstate Commerce Act is the phrase "abandonment" defined although it is utilized therein with some frequency. See 49 U.S.C. §§ 1(18), (19), (20), (22). Consequently judicial interpretation of the concept of abandonment becomes relevant.

In Zinn v. Hanover Bank, 215 F.2d 63 (2d Cir. 1954) the court indicated that abandonment included the concept of a permanent cessation of service. This pronouncement was amplified in Meyers v. Jay Street Connecting R.R., 259 F.2d 532 (2d Cir. 1958) where the court ruled that an indefinite suspension was conceptually indistinguishable from a permanent discontinuation of service. In Meyers, the court affirmed a ruling that an embargo which had been in effect for only two months was an expression of an intention to indefinitely cease all service and was therefore an abandonment within the meaning of 49 U.S.C. §1(20). Similarly, in Commonwealth of Pennsylvania v.

F. Supp. 36 (W.D. Ark. 1960). The implicit recognition in permissible embargo cases is that service will be restored when the impossibility terminates and thus no intent to abandon can be inferred from the cessation. In our view, the converse of that situation exists here since the impossibility created by the June, 1973 flood damage has long since passed and the Railroad makes no serious claim that it is incapable of restoring service on the Beecher Falls branch.

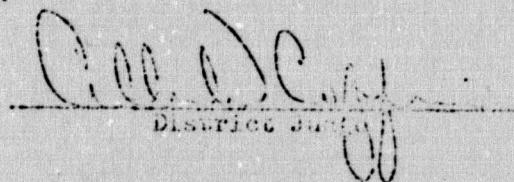
Although the issuance of injunctive relief does not automatically follow from our conclusion that there has been an abandonment inimical to section 1(20), Commonwealth of Pennsylvania v. Penn Central Transp. Co., supra, we believe that in this case restoration of service should be ordered. It is not for this court to decide the relative merits of abandoning the Beecher Falls branch. That task is committed to the ICC which this Court feels should exercise its legislatively mandated duty to pass on the defendant's abandonment application with all practical expediency. However, a major shipper, Ethan Allen, Inc. has heavily relied on the continuation of rail service in establishing its operational scheme and the Company has offered to assist the Railroad in restoring service. The interruption of rail service has had a serious impact on Ethan Allen and has created a hardship for it sufficient to grant injunctive relief. Furthermore, we perceive that it may well be contrary to public convenience and necessity to permit the unilateral termination of the Beecher Falls branch by the Railroad. Finally, the defendant has advanced no compelling reasons why service should not be restored. It has the present financial ability to make the repairs and the impact

thereof is ameliorated by Ethan Allen's offer of economic assistance. Furthermore, the possibility that the abandonment application will be favorably acted on by the Commission on the facts of this case is not a consideration of such compelling force to sanction the Railroad's improper abandonment of the Beecher Falls line.

In light of the above factors, we conclude that an injunction should issue and we hereby order the Railroad to immediately proceed to restore rail service to the Beecher Falls branch so that service may as reasonably as possible approximate the service provided just prior to June 29, 1973. In this restoration effort, the \$52,000 which Ethan Allen has agreed to contribute toward repair of the flood damage shall be applied solely to the cost of repairing damage directly attributable to the flooding as set forth in the Railroad's own damage investigation appearing at page 8 of its abandonment application filed with the I.C.C. Any additional expenses incurred as the result of the length of time of the discontinuation or any deferred maintenance expenditures which may be necessary are to be borne by the Railroad. Upon completion of repairs, the Railroad shall furnish the Court and all parties with an itemized accounting of its total expenditures for such repairs, specifically denoting therein the amounts expended to repair the flood damage described on page 8 of its application for abandonment. Payment by Ethan Allen to the Railroad for its share of expenditures for said flood repairs shall be ordered by the Court upon the Court's approval of said accounting. No hearing shall be held by the Court on said accounting unless

specifically requested by Ethan Allen by motion filed within ten days of the date of filing of said accounting, in which it denotes the areas of said accounting with which it disagrees and the reasons therefor. In the event that the ICC favorably acts upon the Maine Central's abandonment application before the repair work is finished the obligation to finish the repair work shall terminate and Ethan Allen's obligation to the Railroad for payment for flood damage repairs shall be limited to the cost of such repairs accomplished to the date of termination, assuming at such time the cost does not equal or exceed the sum of \$52,000. In the instance of such a termination the Court's instructions with reference to an accounting shall be followed by the Railroad and Ethan Allen. The Court wishes to emphasize that the restoration of service should proceed to completion with all deliberate dispatch and to that end directs that a brief written review of the progress of the repair effort be supplied by the Railroad to the Court every two weeks from the date of this Order.

Dated at Burlington in the District of Vermont,
this 13th day of July, 1974.


District Judge

FOOTNOTES

- 1/ The President of the Maine Central Railroad, E. Spencer Miller, is named as a party defendant. For purposes of this opinion we shall refer to both as the "defendant."
- 2/ The existence of this industry custom was recognized in New York Central P.R. Co. v. United States, 201 F. Supp. 958 (S.D.N.Y. 1962).
- 3/ In New York Central R.R. Co. v. United States, supra, the court indicated that the right of carriers to limit their duty to provide transportation by the issuance of embargoes in the time of emergency is settled.
- 4/ Harlen Valley Transportation Association v. Stafford, F.2d _____, Docket No. 73-2495 (2d Cir. June 13, 1974). The decision holds, *inter alia*, that the ICC must take an active role in preparing the environmental impact statement required by Section 102(2)(c) of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347, by preparing a draft thereof prior to any public hearings on an abandonment petition so that the Agency's evaluation of environmental issues is available for the public's comments prior to a determination of the abandonment petition and so that such a statement can accompany the petition through the Agency's review process.
- 5/ The defendant, relying on New York Central R.R. Co. v. United States, supra, contends that the ICC has power to issue an order annulling an embargo on grounds that it is an unreasonable practice within the meaning of Section 1(6) of the Interstate Commerce Act. However, the legality or validity of the embargo itself is not at issue here but rather the underlying cause of the necessity for the embargo which the ICC alleges is an illegal abandonment. As indicated above, we believe that when an illegal abandonment occurs as contrasted with merely an embargo, the doctrine of primary jurisdiction does not foreclose the Commission or any other party enumerated in 49 U.S.C. § 1(20) from exercising his rights to judicial relief. We note in passing that New York Central R.R. Co., supra, was not concerned with a cessation of all service on a line but rather a refusal to accept less than carload shipments because of financial reasons and thus there probably was no basis for proceeding with an abandonment action in that case.
- 6/ Defendant urges us to adopt the position of the court in Commonwealth of Pennsylvania v. Penn Central Transportation Co., supra, where, although the court found that there had been an abandonment within the meaning of Section 1(20) of the Act, it refused to issue an injunction pending a decision by the ICC on whether to permit abandonment. We find this aspect of the case inapposite to the matter before us since in that case the restoration cost was over \$650,000 and the defendant Railroad was a bankrupt. Indeed, the court indicated that as a condition to granting plaintiff the injunction it sought, it would have required the plaintiff to obtain permission to maintain the suit from the court exercising jurisdiction over the bankrupt.

ORDER

INTERSTATE COMMERCE COMMISSION

AB 83

MAINE CENTRAL RAILROAD COMPANY ABANDONMENT BETWEEN
CARROLL, NEW HAMPSHIRE AND CANAAN, VERMONT, IN COOS
COUNTY, NEW HAMPSHIRE AND ESSEX COUNTY, VERMONT

PRESENT: Kenneth H. Tuggle, Commissioner, to whom the matter which is the subject of this order has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of a staff-prepared environmental threshold assessment survey which is available for public inspection upon request; and

It appearing, That no environmental impact statement need be issued in this proceeding, because this proceeding does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq.; and good cause appearing therefor:

It is ordered, That applicant be, and it is hereby, directed to publish the appended notice in newspapers of general circulation in Coos County, N.H., and Essex County, Vt., within 15 days of the date of service of this order, and certify to the Commission that this has been accomplished.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by forwarding a copy to the Director, Office of the Federal Register, for publication in the Federal Register.

Dated at Washington, D.C., this day of 1974.

By the Commission, Commissioner Tuffle.

ROBERT L. OSWALD,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

NOTICE

AB 83

MAINE CENTRAL RAILROAD COMPANY ABANDONMENT BETWEEN
CARROLL, NEW HAMPSHIRE AND CANAAN, VERMONT, IN COOS
COUNTY, NEW HAMPSHIRE AND ESSEX COUNTY, VERMONT

The Interstate Commerce Commission hereby gives notice
that by order dated 1974, it has been determined
that the proposed abandonment by the Maine Central Railroad
Company of its line of railroad or of operations over such
line between Carroll, Coos County, N.H., and Canaan, Essex
County, Vt., if approved by the Commission, does not constitute
a major Federal action significantly affecting the quality
of the human environment within the meaning of the National
Environmental Policy Act of 1969 (NEPA), 42 U.S.C. ss 4321,
et seq., and that preparation of a detailed environmental
impact statement will not be required under section 4332(2)(C)
of the NEPA.

It was concluded, among other things, that the environmental
effects of the proposed action are considered insignificant because (1) rail service will continue to be available
upon abandonment between Waumbek Junction and North Stratford,
N.H., over existing or acquired rail lines of the Boston and
Maine Corporation or the Canadian National Railway Company,

(2) diversion of rail traffic potentially available over the segment of line between North Stratford and Beecher Falls, Vt., will not be significant in relation to the total volume of freight movements within the States of Vermont and New Hampshire, (3) degradation of the area's ambient air quality and noise levels will be minimal, and (4) there are no definitive local economic development projects dependent upon the availability of direct rail access.

This determination was based upon the staff preparation and consideration of an environmental threshold assessment survey, which is available for public inspection upon request to the Interstate Commerce Commission, Office of Proceedings, Washington, D.C. 20423; telephone 202-343-2086.

Interested parties may comment on this matter by the submission of representations to the Interstate Commerce Commission, Washington, D.C., 20423, on or before

(15 days from publication)

OFFICE OF PROCEEDINGS
ENVIRONMENTAL THRESHOLD ASSESSMENT SURVEY
AB 83

MAINE CENTRAL RAILROAD COMPANY ABANDONMENT BETWEEN
CARROLL, NEW HAMPSHIRE AND CANAAN, VERMONT, IN
COOS COUNTY, NEW HAMPSHIRE AND ESSEX
COUNTY, VERMONT

I. Description of Action

By application filed July 24, 1973, the Maine Central Railroad Company (MEC) proposes the abandonment of its line of railroad or of operations over such line between Carroll, Coos County, N.H., and Canaan, Essex County, Vt., a distance of approximately 57.52 miles. The abandonment involves segments of the line owned by applicant or segments of lines owned by other railroads over which applicant operates under trackage rights. (See map, Exhibit A). These segments are as follows:

The first segment of line to be abandoned is owned by applicant, and begins at Quebec Junction, N.H., and extends to Coos Junction, N.H., and is 13.02 miles in length. Boston and Maine Corporation (B&M) presently operates over this segment between Waumbek Junction and Coos Junction (about 10.53 miles) under trackage rights agreed to in 1932. This agreement provided in part that in the event of an authorized abandonment by MEC, the tenant railroad (i.e., B&M) shall have the right to purchase or sub-lease the line of railway. When the instant abandonment was proposed, the B&M initiated correspondence with the MEC stating its intention to exercise its purchase

right. The participating railroads have agreed that the value of the line will be \$100 thousand and have reached a firm understanding as to the general terms and conditions of the purchase, although a final agreement has not yet been prepared.^{1/} The B&M presently provides direct rail service to the Groveton Paper plant at Groveton, N.H., over this segment and said service is expected to continue should the proposed abandonment be approved.

The second segment of line, over which applicant seeks authority to abandon operations, is owned by B&M and applicant operates under trackage rights. This segment begins at Coos Junction and extends to Groveton in the Town of Northumberland, N.H., and is 8.82 miles in length. Boston and Main Corporation is presently operating over this segment and will continue to do so if applicant abandons operations.

The third segment of line, over which applicant seeks to abandon operations, is owned by Canadian National Railway Company (CN) and applicant operates under trackage rights. This segment begins at Groveton and extends to North Stratford, N.H., and is 12.72 miles in length. Canadian National Railway Company is presently operating over this segment and will continue to do so if applicant abandons operations.

The fourth segment of line to be abandoned is owned by applicant and begins at North Stratford and extends to Beecher Falls, Vt., and is 22.96 miles in length. Between June 29 and July 1, 1973 heavy rains and flooding damaged the North Stratford to Beecher Falls segment. Abutments were damaged at three bridges, two culverts will have to be replaced, and there was

1/ Personal communication, General Counsel, Boston and Maine Railroad Company (August 21, 1974).

2/ Summary report on Maine Central Abandonment Meeting, Manchester, N.H. (December 27, 1973).

was roadbed damage over approximately 4 miles of track. Accordingly, the MEC on July 3, 1973, placed an embargo on the line and terminated all rail service. Prior to the embargo, the track was considered in good condition with train travel at 20 to 25 miles-per-hour --the posted speed. The few derailments on the segment were primarily caused by expansion of rails from solar heating.^{3/}

The requisite repairs have not been completed and rail service over the line has yet to be resumed. Therefore, in a proceeding instituted by the Interstate Commerce Commission, the United States District Court for the District of Vermont determined that the mentioned embargo was an illegal abandonment of the segment. The Court noted that the MEC "is neither financially nor physically unable to repair the damage caused by the flood and resume operations on the Beecher Falls branch."^{4/} The decision further held that the interruption of rail service has had a serious impact on the Ethan Allen Furniture Company plant at Beecher Falls and has created a hardship for it sufficient to grant injunctive relief. The MEC was thereby ordered to immediately begin repair of the line and to restore service forthwith. The ordered repairs were begun on August 13, 1974,^{5/} although the district court decision has been appealed to the Second Circuit.^{6/}

There are no other rail abandonments pending or anticipated which will affect consideration of the present application. It should be noted, however, that the report issued

3/ Decision in I.C.C. et al. v. Maine Central Railroad, Civil Action File No. 74-81 (D. Vt., 1974).

4/ Ibid.

5/ Note 1, supra.

6/ Should the requisite repairs continue unabated, it is estimated that rail service may be restored in approximately 60 days, with further delays anticipated thereafter.

February 1, 1974, by the Secretary of Transportation entitled "Rail Service in the Midwest and Northeast Region" listed Groveton, N.H., and Newport, Orleans, and St. Johnsbury, Vt., as points recommended for continued rail service. On the other hand, the Canadian Pacific line between Orleans and St. Johnsbury and the MEC line between Beecher Falls and North Stratford, as well as other nearby rail lines, have been designed as potentially excess. It is, therefore, possible that abandonment of these later lines may be proposed at some future time. (See maps, Exhibit B).

There are in addition two current Commission proceedings tangentially related the subject application. In Finance Docket No. 27620, the MEC in a complaint case charged that the Amoskeag Company, which controls the Bangor and Aroostook Railroad Company (BAR) has acquired control of the MEC (predicated upon a 34.6 percent stock ownership) and is in violation of Section 5(4) of the Interstate Commerce Act. In a related proceeding (Finance Docket No. 27621) Amoskeag seeks authority under Section 5(2) of the Interstate Commerce Act to vote its shares and thereby acquire control of the MEC. It is expected that the ultimate adjudication of these proceedings most likely will not occur for some time and the related environmental impact will most likely be limited to a mere change of ownership and perhaps future disposition of certain duplicative properties, should the two rail companies be merged. Because the action addressed in this assessment concerns a possible abandonment of rail service, it will not be directly affected by any possible change in corporate ownership and further consideration of the complaint and control proceedings is not warranted.

A substantial part of the underlying right-of-way between Quebec Junction and Coos Junction and between North Stratford and Beecher Falls was acquired by condemnation in proceedings before the New Hampshire Board of Railroad Commissioners and ownership of the applicant would be an easement for railroad purposes. The balance was acquired by various deeds in most of which the applicant or its predecessors in title acquired ownership of the land in fee simple. In some deeds there is a reference to use of the land for railroad purposes, and whether the applicant acquired ownership of the fee or of some lesser estate would require a review of the language in each individual deed.

Where the MEC is the fee owner of the property, the normal practice upon abandonment would be to first salvage useable material and then offer the property for sale--normally to adjacent landowners in the first instance. Salvage operations will include the removal of all rails, track material, salvable cross ties, bridge ties and other bridge timber, all steel bridges and all buildings. All dismantling and salvage operations will be performed on railroad property. Rails at highway grade crossings may not be removed where this would necessitate regrading of the road surface. ^{7/}

Applicant has estimated the net salvage value of the Quebec Junction to Coos Junction at \$220,468 and the Beecher Falls branch at \$354,606. ^{8/}

II. Transportation Profile

Carload traffic handled over the subject line for the last 2 full years of operation as well as for the first 3 months

^{7/} Personal communication, Chief Counsel, Maine Central Railroad (August 29, 1974).

^{8/} The above estimates have been raised recently by applicant due to accelerating scrap iron and steel prices. The estimate is in the range of \$450 thousand.

of 1973 was as follows:^{9/}

<u>Commodity</u>	<u>1971</u>	<u>1972</u>	<u>1st 3 Mos. 1973</u>
Furniture	580	709	194
Lumber	83	81	19
Pulpwood	420	373	286
Feed	275	262	85
Miscellaneous	<u>132</u>	<u>146</u>	<u>98</u>
Total	1,490	1,571	682

The predominant shipper on the line was the Ethan Allen Furniture Company plant at Beecher Falls, which transported 791 carloads of freight in 1972 and 424 carloads in the first 6 months of 1973 prior to the embargo. Should rail service be resumed, a similar volume would be tendered applicant with increases possible due to plant expansion and reconversion of the facility from oil to coal heat.^{10/}

A second important pre-embargo shipper was the St. Regis Paper Company at Beecher Falls, with carloadings accounting for about 20.5 percent of the branch traffic in 1972 and 1973. Since the embargo, St. Regis transferred its woodpulp operation to Wenlock, Vt., located alongside the CN. Unsatisfactory service and failure to supply adequate cars were cited as reasons for the shift. Although the bulk of this freight will continue to be handled by the CN, the company may tender 100 cars annually to the MEC if service is resumed.

^{9/} Data includes overhead or bridge traffic totalling 109, 119, and 69 cars in 1971, 1972, and 1973, respectively. Excluded is interline traffic which was until recently transported over the MEC line between Quebec Junction and Lancaster but is now interlined with the B&M at Whitefield and thence shipped to Lancaster via Waumbek Junction. This traffic, consisting of paper products, woodpulp, and oil and fuel, was approximately 2,900 cars in 1972 and the first 6 months of 1973.

^{10/} Personal communication, Plant Manager, Ethan Allen Furniture Company, Beecher Falls, Vt. (August 23, 1974).

^{11/} Note 2, supra.

Other prior shippers along the MEC line are located South of North Strafford and would continue to have direct rail access provided by either the CN or the B&M. They will, therefore, be essentially unaffected from an environmental point of view by the proposed abandonment.

The road network adjacent to the area served by the proposed abandonment can be characterized as mainly secondary, lightly trafficked roads which often pass directly through small residential communities. For example, Vermont State Highway 27 connects Beecher Falls and Canaan, Vt., and has a black top, paved surface 20 feet wide with 4 foot shoulders. There are no settlements of any import along this segment, although there are some adjacent scattered houses. In 1972, the highway experienced an average daily vehicular load of 660, comprised primarily of private automobiles with some logging traffic.^{12/} Vermont State Highway 102 parallels the rail line from Canaan to Lancaster along the west bank of the Connecticut River. This road is partially paved with surface gravel and a 20 foot road width which, unlike Highway 27, passes through small villages. Its average daily traffic totaled 600. Traffic originating at Beecher Falls or north would tend to use Highway 27 to Canaan and thence Highway 102 to Colebrook where a connection is available to U.S. Highway 3 (a paved undivided highway) which runs south to a connection with Interstate Highway 93.^{13/}

Since the July 3 embargo, much of the freight which previously originated at the Ethan Allen plant for shipment over

^{12/} There may be disruptions in rail service caused by more circuitous routing, possible reduced availability of rail cars, etc., but these considerations are beyond the scope of this impact assessment.

^{13/} Personal communication, Assistant District Supervisor, District 9, State of Vermont, (July 21, 1974).

^{14/} Personal communication, Vermont Highway Dept.

the Beecher Falls segment of the line has been re-routed to approximated 50 miles southwest of Vermont, to Orleans where the company maintains a large consolidation and distribution center. This freight is currently shipped by truck over Vermont State Highways 114, 105, and 5A for subsequent shipment over the Canadian Pacific line through Orleans. In the winter months, the traffic is re-routed through Newport, Vt., ^{15/} over U.S. Highway 5 to Orleans.

III. Description of Existing Environment

The proposed abandonment generally traverses along the east bank of the Connecticut River between Lancaster and Beecher Falls. The tributary area is characterized by open low mountains interspersed with some gentle sloping topography located in the lowlands. Vegetation consists primarily of northern Woodlands and spruce forests and the area historically experiences 40 to 48 inches of annual precipitation which on occasion is highly concentrated and causes some flooding of low-lying areas.

The Connecticut River Valley is an alluvial valley traversed by the river from which recharge of ground water can be induced. Water quality in the area is quite good, with low sediment levels and low concentrations of dissolved minerals in ground or surface waters. Due to the essentially rural character of the surrounding land uses and the lack of a substantial number of major pollution sources the area's ambient ^{16/} air quality is quite good.

The economy of Carroll and Coos Counties, N.H., and Essex County, Vt., are predominantly rural oriented. For example, with a combined population in 1970 of 58,255, the popu-

lation density is approximately 17.0 per square mile with 74 percent of the inhabitants living in rural areas. This compares to the population densities of 81.7 and 47.9 in New Hampshire and Vermont, respectively, and less than 47 percent of the combined population living in rural areas. Major industries in the counties include agriculture, forestry, construction, and manufacturing, particularly wood products and furniture concerns. Unemployment as a percent of the total civilian labor force in 1970 was as follows:

Carroll County	5.0
Coos County	4.9
Essex County	6.1
State of New Hampshire	3.5
State of Vermont	4.1

Although the above rates compare favorably to national statistics, the economics in the affected counties remain somewhat depressed and have not shared the general economic expansion which characterized the States during the last decade. New Hampshire's population increased 21.5 percent during this period, while Carroll County's increase was only 17.2 percent and Coos County's population actually declined 7.7 percent. Similarly, Vermont's population growth during the 1960's was 14.0 percent while Essex County experienced an out-migration rate of 11.0 percent.

The area's family incomes were likewise considerably below that of the States as demonstrated below:

	Median Family Income	Mean Family Income	Percent of Families Below Poverty Level
Carroll County	\$ 8,070	\$ 9,259	9.4
Coos County	8,137	8,890	9.9
Essex County	7,307	7,987	14.0
State of New Hampshire	9,698	10,776	8.7
State of Vermont	8,929	10,099	

^{17/} Source for socio-economic information.

Carroll and Coos Counties have been designated as depressed counties by the Economic Development Administration, U.S. Department of Commerce. For a more detailed overview of the economics in the affected area, refer to Exhibit C.

IV. Relationship to Land Use Plans, Policies, and Controls

The interest of the State of New Hampshire in the maintenance and availability of its rail network is represented in the final report of the Speaker's Ad Hoc Committee on the Condition of Railroads in New Hampshire, which was submitted to the Speaker of the House January 26, 1974 (See Exhibit D). This report noted the importance of rail service to local industry in that "at least 12,000 industrial jobs producing \$187 million and 5,000 farm-related jobs producing \$65 million are dependent on railroads." On the other hand, the report further noted that 300 miles of track in the State have been abandoned between 1915 and 1968, with an additional 224 miles of track proposed for abandonment in the last 5 years.

In order to insure continued operation of abandoned rail lines, the report favors State ownership of rail lines, preferably for short line operation. Some of the advantages of this approach were cited as follows:

- o small operation would improve management and labor agreements,
- o would be more responsive to needs of local customers and communities,
- o with State ownership of right-of-way, operator would pay no property tax, and
- o State-owned track would be eligible for Federal disaster relief grants.

The Committee's recommendation were subsequently incorporated into New Hampshire House Bill 31 which was passed by

the New Hampshire legislature and became law in June 1974. (Revised Statutes Annotated, Chapter 49). In the Act's declaration of findings and purposes, it was stated that "the public convenience and necessity require adequate and efficient rail service in this state to meet the needs of commerce, shippers, consumers, the political subdivisions of the State and the service requirements of passengers." Rail service was also recognized as offering economic and environmental advantages with respect to land use, air pollution, noise levels, and energy efficiency and conservation. Accordingly, the Act declared that the policy of the State "is to preserve for continued rail service or other public uses the line or lines of all railroads within the State."

To effectuate this policy House Bill 31 authorizes the New Hampshire Public Utility Commission (PUC) to act as the sole agent for the State and to purchase by condemnation or otherwise rail property which would be necessary for the continued or future operation of the railroad. Such acquisition is declared to be a public purpose and to be reasonably necessary. If the PUC is unable to acquire needed rail property it may institute condemnation proceedings against the concerned railroad company. Furthermore, all rail properties within the State offered for sale after enactment of the Act must be offered to the State in the first instance and the PUC shall have the right to match any bona fide offer made for rail properties within the limits set forth in the Act. Four million dollars were appropriated to carry out the purposes of the act.

It is important to emphasize here that the intent of House Bill 31 was not to promote rail abandonments and subse-

quent state acquisition of rail properties. Rather, New Hampshire is concerned with maintaining intact its rail system and the recent legislation merely provides a mechanism to facilitate continuation of rail service in the event authorization for abandonment may be obtained. ^{18/} To the extent the MEC proposes the abandonment of a line of railroad in New Hampshire, the proposed action is clearly inconsistent with established State rail policy and plans.

In furtherance of the above policy the MEC and PUC have met on three occasions during the past two months to discuss State acquisition of the Beecher Falls branch. ^{19/} The State generally feels that \$100 - 200 thousand represents a fair and reasonable price for the purchase of the affected rail properties, while the MEC believes that the purchase price should approach the line's net salvage value.

The importance of continued rail service to industry in a general sense was mentioned previously. As applicable to the instant proceeding, the availability of rail access is considered by the State of New Hampshire to be an important element in the area's economic development process. A 15 acre industrial park is in the planning stage for a proposed site in Colebrook adjacent to the MEC line. While it is not known which specific industries may eventually locate there, they are expected to be forest related. Local planners have indicated that the existence of the rail line will be an important selling point in their efforts to attract business concerns. Location of other potential industrial parks in the area will

^{18/} Personal communication, Deputy Commissioner, Vermont Public Service Board (August 21, 1974).

^{19/} Although applicant has stated its intention to progress with the instant abandonment proceeding and its appeal of the District Court decision concerning the embargo.

similarly be predicated in part upon the existence of transportation services, such as rail and road access. Abandonment of the subject line will, therefore, tend to impede developmental efforts.²⁰

Expansion of existing firms may also be influenced by the continuation of rail service. For example, the Ethan Allen plant at Beecher Falls had growth plans which have been delayed since the embargo and the questionable future status of the rail line. St. Regis Paper Co. also planned to expand its facility at Beecher Falls, but due to unsatisfactory service provided by the MEC built its expanded facilities on a Canadian National siding.²¹ These examples are intended to be illustrative of the nexus between rail service and the local economic development process. It should be realized, however, that rail service is only one of the factors which will influence industry retention and expansion in the area. Labor and resource supplies, alternative transportation means, etc. also influence the decisional process. Because concrete plans for future industrial sites and attendant occupation have not yet been formulated, it is not possible to positively state what the impact of the abandonment will be on local development plans beyond merely noting that these plans will be impeded to an as yet unquantifiable degree.

IV. Environmental Impact of Proposed Action

1. Air Quality.²² Air quality in the affected area will be degraded to the extent traffic which previously

²⁰/ Personal communication, Deputy Director, New Hampshire - Vermont Development Council, Inc. (August 20, 1974).

²¹/ Note 2, supra.

²²/ Source: ICC Reference Manual Assessment and Proposed ... threshold ... March, 1974).

was transported by rail is now moved by motor carriers.

Since rail service is expected to continue to points between North Stratford and Waumbek Junction, this impact will only concern shippers along the Beecher Falls branch. More specifically the approximately 800 annual carloads of freight transported at the Ethan Allen plant have been shipped by truck since the July 3, 1973, embargo and this traffic pattern would continue if the line is permanently abandoned.

The increase in emissions when utilizing diesel truck instead of rail transportation has previously been calculated to be a factor of 3.06 for carbon monoxide (CO), 3.29 for nitrogen oxides (NO_x), and no change for hydro-carbons. For an equivalent haul of 50 miles, this equates to an increase of approximately 9,000 pounds of CO and 10,000 pounds of NO_x emissions annually. In comparison to total emissions from the transportation sector in Vermont and New Hampshire, the increase caused by the diversion is not significant.^{23/}

Furthermore, in view of the lack of major air pollution problems in the affected area, the cumulative impact on air quality will be insignificant.

2. Noise. Ambient noise levels in the affected area will be increased slightly as a result of diversion of Beecher Falls branch traffic to motor carriers. While noise levels associated with rail transport are generally higher than those for motor carriers, the

^{23/} In 1972, fuel oil sales to railroads and on-highway users totaled 26 million gallons. Consumption of this fuel generated CO emissions of 5.5 million pounds and NO_x emissions of 9.0 million pounds.

greater incidence of truck travel over rural roads will increase the number of single-event noise intrusions. Since these roads are presently utilized (albeit somewhat sparsely in some instances) and the volume of traffic is fairly minimal, the cumulative effect will be insignificant.

3. Safety. The abandonment will enable the elimination of the following highway grade crossings along the Beecher Falls branch:

<u>Milepost</u>	<u>Location</u>
140.83	Columbia, N.H. - Columbia Bridge Road
144.78	Colebrook, N.H. - Colby Street
145.08	Colebrook, N.H. - Bridge Street
152.76	Stewartstown, N.H. - Town Road
152.93	Stewartstown, N.H. - Town Road
153.06	Stewartstown, N.H. - Town Road
153.15	Stewartstown, N.H. - State Highway
153.36	Canaan, Vt. - Connecticut Avenue

In this manner the potential for motor vehicle/train collisions will be removed and safety thereby improved. However, the greater incidence of truck travel over rural roads may result in a corresponding slight increase in accident hazards. This impact is expected to be minimal because of the low volume of freight affected.

4. Transportation. The greater volume of motor carrier traffic may accelerate the need to upgrade and widen roads in the affected area.^{24/} The timing and expense required for such an effort is speculative and not believed to be significant.
5. Wildlife and Vegetation. If rail service is terminated, it is likely that the right-of-way would revert

^{24/} Notes 13 and 14, supra.

to its natural state with minimal concomitant impact on wildlife and vegetation.

6. Archaeological and Historical. There are no sites listed in the National Register of Historic Places which will be affected by the proposed abandonment.
7. Socio-economic. As discussed previously, abandonment of the rail line may impede local economic development efforts. Industries which may be attracted to the area in the future may be less inclined to locate in the area if continued rail service were not available. Expansion plans of existing industries may similarly be affected. In addition, the lack of rail service may increase transportation costs to local shippers and thus impair to a degree their competitive posture and profitability. This latter issue is beyond the scope of this assessment survey and is more properly pertinent to the ultimate adjudication of the proceeding on the merits and the present or future public convenience and necessity.

Employees of the railway may be protected by the imposition of the so-called "Burlington conditions" whereby affected labor interests are protected for 4 years.

8. Public Awareness. Notice of the proposed abandonment was published once a week for three consecutive weeks in August and September 1973, in the Caledonian-Record, N.H. News and Sentinel, and The Coos County Democrat, newspapers of general circulation in Essex County, Vt., and Coos County, N.H. Interested parties were informed that their protests could include a statement indicating

ting the presence or absence of any effect of the requested Commission action on the quality of the human environment. Comments received in response to these notices have been incorporated into the text of this assessment.

V. Alternatives to the Proposed Action

1. Denial of Application. This alternative would essentially maintain the status quo, although it should be noted that the line between North Stratford and Beecher Falls was embargoed on July 3, 1973, and there has been no rail service from that date to the present. The United States District Court for the District of Vermont in a proceeding instituted by the Commission, however, found that the embargo was tantamount to an unauthorized abandonment and ordered the railroad to immediately commence the necessary repairs to enable resumption of rail service.^{25/} Such repairs were begun on August 13, 1974.

A denial of the application coupled with a reopening of the Beecher Falls branch will enable the traffic from the Ethan Allen plant to be diverted back to rail transport. There will be a slight improvement in ambient air quality and noise levels, although the associated environmental benefits will be minimal in view of the minimal amount of freight affected. The accident hazard at light highway grade crossings will be re-introduced and local safety thereby minimally degraded.

^{25/} Note 3, supra.

The primary benefit of this alternative thus is that it would be entirely consistent with the State of New Hampshire policy of maintaining rail operations. Local economic development efforts may be benefited by the availability of rail service. However, the lack of definitive plans of any business concern to locate in the region (with such decision predicated on the continued existence of the rail line) indicates only speculative benefits in this regard.

Denial may benefit certain local shippers and correspondingly require the MEC to continue to expend maintenance monies on what applicant has stated is an unprofitable line. The merits of these economic factors, however, more properly pertinent to the ultimate adjudication of the proceedings on the merits and are thus beyond the scope of this assessment.

2. Condition the Abandonment Giving Government Units an Option to Purchase the Right-of-Way. The New Hampshire Public Utility Commission has expressed its desire to purchase the segment of the line proposed for abandonment between North Stratford, N.H., and Beecher Falls, Vt., for continued rail service most likely as a short line. The environmental impacts of this alternative are similar to those discussed above for a denial of the application. In addition, a consummated agreement may actually lead to an improvement in rail service for the reasons suggested in the January 26, 1974, Speaker's Ad Hoc Committee report (Exhibit D). Although the recently enacted House Bill 37 grants the State the right of first purchase

E.C.

of the line, this statute has yet to be tested in the courts. Accordingly, it is recommended that the following condition be incorporated in the Commission order should the abandonment be approved:

The Maine Central Railroad Company shall offer for sale the segment of its line from North Stratford, N.H., to Beecher Falls, Vt., to any responsible State agency offering, within 120 days of the issuance of the certificate, to purchase the same for continued operation or any other public purpose.

Because of the reversionary interest of portions of this segment, the condition would be applicable only to the rail property which the MEC owns in fee. It is the intent of this condition to insure that the rail property shall be kept in tact during the 120 day period during the pendency of expected negotiations between the State of New Hampshire and MEC.

Applicant has not expressed objection to the imposition of the above condition.

VI. Relationship Between Local Short-Term Uses of Man's Environment and Maintenance and Enhancement of Long-Term Productivity.

Accomplishment of this action without subsequent purchase by the State of New Hampshire for continued rail service will result in a 23 miles segment of rail property to be either sold to adjacent landowners or returned to its natural state. There will be some degradation of the area's ambient air quality and noise levels caused by a permanent diversion of traffic to motor carriers. Future economic development efforts may be impeded if the area becomes less desirable for business relo-

cation or expansion because of the lack of direct rail access.

VII. Any Irreversible and Irretrievable Commitment of Resources Which Would Be Involved If the Proposed Action Is Implemented

Approval of the proposed abandonment between North Stratford and Beecher Falls may preclude reactivation of a rail line which represents a small fraction of the area's total transportation system. Otherwise, there are no known irreversible and irretrievable commitments of resources involved.

VIII. Conclusions

The minimal amount of potential rail traffic which would be affected by a permanent abandonment of the subject rail line demonstrates that this action will not significantly affect local air quality and noise levels. Anticipated increases in air emissions will be almost imperceptible when viewed in relation to total emissions derived from the transportation sector in the States of Vermont and New Hampshire. There will be some increase in truck usage over nearby highways, but these roads already experience the environmental effects associated with motor carrier operation. The added increment in truck transport diverted from prior or potential rail usage may accelerate the need to upgrade or widen certain roads, although this occurrence is speculative and not considered significant.

Permanent abandonment of rail service will be inconsistent with the policy of the affected States to preserve their existing rail system. In addition, the lack of direct rail access over portions of the line proposed for abandonment may be a disincentive to relocation or expansion of business concerns in the area. However, there are no known definitive plans

for future industrial development projects which would be directly affected by the discontinuance of rail service. That is, funding has not yet been obtained nor specific sites secured for industrial parks in the region which would necessitate direct rail access.

IX. Environmental Determination

Based on an examination of the foregoing information and supplemental information contained in the files for this case, it is concluded that this action will not significantly affect the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C., [§]s 4321, et seq. Preparation of a detailed environmental statement, therefore, is not required.

EXHIBIT A

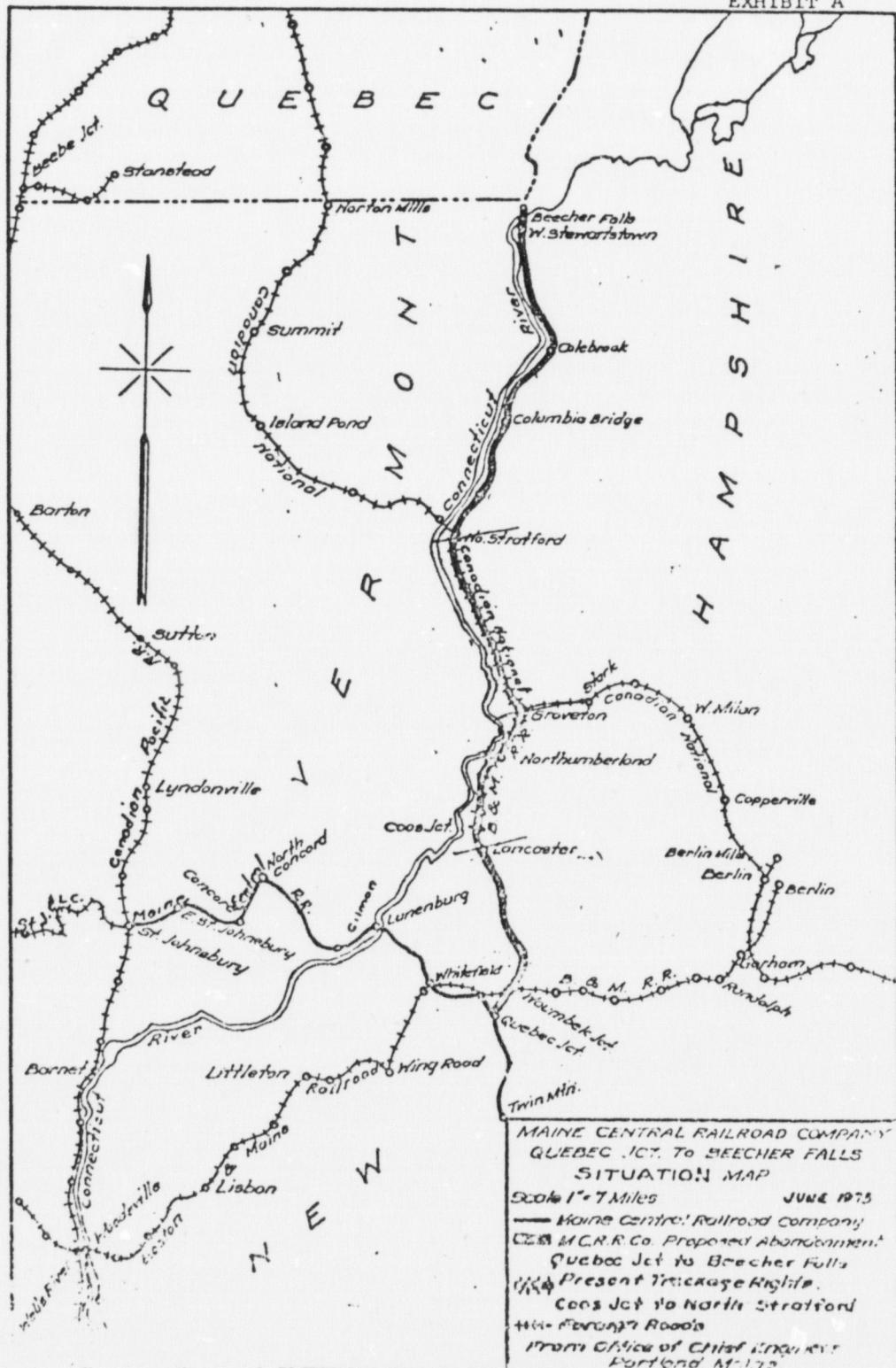


EXHIBIT C

A - 1

A. OVERVIEW

The district is now, as it has been since designation, characterized by serious underemployment as well as unemployment. The symptoms are wages and median family incomes which are lower than those of either State, the New England region, and the nation. Trends are not uniform throughout the district, but generally wages and incomes are increasing more slowly than outside the district; the income gap between the district and the outside world is widening.

Underemployment is necessarily associated with outmigration; people unable to find suitable employment tend to move out of the district to look for better jobs elsewhere. An examination of 1970 Census figures indicates that the rate of outmigration has been arrested and, in some locations, reversed. But more detailed study suggests that, in most areas, the trend has merely changed its characteristics. An exodus of people in their prime working years is continuing, but is offset by a high rate of retention of people above 65 and a substantial immigration of people in higher age groups, presumably to live out their retirement years in the district. This phenomenon is best illustrated in Coos County, where the net population loss in the decade of the '60's was almost 3,000 but the number of people over 65 increased by 200.

The principal factors at work are the following:

1. Continued dependence on traditional sources of employment. Wood-using industry, nationally a non-growth industry, is overwhelmingly the largest source of employment. The pulp and paper industry, represented by two large plants and several small ones, has experienced a long term decline in employment but currently pays high wages and is booming. Other wood-using industries pay below average wages and, with the exception of the furniture industry, show consistently declining employment figures. In the Vermont portion of the district, agriculture - specifically dairy farming, is still a mainstay of the economy, but its contribution, measured by the amount of employment it generates, is steadily declining. The electrical products and metal-working industries, major employers elsewhere in New England and generally payers of relatively high wages, are woefully underrepresented in the district.
2. Effects of the recreation industry. Because most employment generated by recreationally-oriented business is not reported separately but instead is concealed in employment figures reported by employers falling into the standard reporting categories, figures on the economic impact of this industry are hard to come by and partly suspect because of intrusion of subjective evaluations. Nevertheless, estimates that recreation accounts for 15-20 per cent of all employment in the New Hampshire portion of the district and perhaps slightly more in the Vermont portion have some authoritative backing and are probably not far from the mark. This substantial slug of employment is, however, partly seasonal, and is composed mostly of unskilled - and therefore low-paying - jobs. Additionally, some, perhaps many, of these jobs are filled by transient or migratory workers and - in the summer, particularly - by college students, some from outside the district.
3. Diffusion of the district's population. The district's population of 218,000 - up some 8,000 from 1960 to 1970 - is distributed over about 4,000 square miles, resulting in population density approximately one half that of the nation. This thin spreading of the district's human resource is

accompanied by its distribution among approximately 200 different local governmental subdivisions, resulting in an average population per unit of only slightly more than 1,000. There are two unfortunate results. Most communities in the district are too small to command sufficient resources to cope effectively with the problems thrust upon them by a society and economy which is both complex and complicated. And the absence of large concentrations of population, and therefore of effective concentrations of labor, is a handicap in attracting new employers.

4. An unskilled labor force. The district's dependence on traditional industry, most of it non-growth or declining as a source of jobs, results in few people being trained in the skills required by growth industry. The result is structural unemployment - unemployment and unfilled jobs existing side by side because the unemployed do not possess the skills and training required to fill vacancies, some actual and others potential. The problem is not simply a result of inadequate training facilities; in fact, the district has some excellent facilities for occupationally oriented training. Partly, the structural unemployment situation results from the difficulty of anticipating the skills needed in a fast-changing economy. For example, the district has recently been experiencing increased demand for workers with skills in metal machining; this increased demand follows a period in which workers with this skill were a drug on the labor market and training had therefore been deemphasized. Some structural unemployment is also attributed to vocational counseling which is based on inadequate information on the type of job opportunities actually or potentially available in the district.

5. Housing shortages. Housing is in short supply throughout the district. The economy suffers in two ways: new or expanding industry cannot recruit needed workers because housing within reasonable commuting radius is not available; and unemployed people are unable to move to centers of economic activity to take advantage of employment opportunities and to aggregate in the viable concentrations of labor necessary to a dynamic economy.

6. Inadequacies in sewerage, water supply and distribution, and developed industrial acreage. The three deficiencies go hand-in-hand, since industrial sites require water and sewerage; water and sewerage frequently also are a precondition to housing development. This problem is less acute than formerly, as a result of district concentration upon remedying these obstacles to economic development. There still remain areas in the district with development potential where industrial and economic growth is stymied by the absence of water, sewerage, and/or industrial land.

7. Changing energy supplies and costs. The outcome of the energy shortage which surfaced in the fall of 1973 cannot be precisely projected but all information indicates that the resulting problems will be continuing ones. Spiralling fuel costs are forcing up the cost of living and of doing business. This, along with the uncertain gasoline supply, has set the stage for a leveling if not a decline in the district's economy. The district is particularly vulnerable to energy problems on a number of counts:

- a. Residents commute long distances to jobs which are often low paid.
- b. Residents have high heating requirements because of the cold climate.
- c. The district is at the extremity of a tourism and second home area serving the urban northeast corridor. Recreational activity will decline if gasoline prices are high, supply low, or if real income declines.

EXHIBIT D



State of New Hampshire
HOUSE OF REPRESENTATIVES
CONCORD

January 26, 1974

Honorable James E. O'Neil, Sr.
Speaker of the House
Room 310
State House
Concord, N. H. 03301

Dear Mr. Speaker:

We are pleased to submit this final report of the Ad Hoc Committee on the Condition of Railroads in New Hampshire.

Our preliminary report of November 15, 1973, although broad in scope, has laid the groundwork for this, our final report, and the legislative recommendations contained therein.

Since submitting our preliminary report, we have continued our travels about the state; and our meetings with railroad officials, railroad customers (past, present and potential), state and local government personnel, legislators and others in neighboring states, congressional and Federal Government personnel and others.

We have studied and cross-referenced all available reports and collated and weighed all intelligence to a degree that we have, presently, virtually completed a most complicated jig-saw puzzle.

We repeat that we have not dwelt on railroad passenger service but have by no means overlooked the potential need for such service, particularly in view of the probability of a continuing energy situation. It is obvious that without freight service there cannot be passenger service.

We have carefully studied the railroad lines of the state, including those now in use, those where abandonment has been requested by the railroads, and those where recent abandonments have been granted.

We have considered the condition of the Boston and Maine Railroad, now in bankruptcy, and the prognosis for its future.

With relation to acquisition of railroad properties you will especially note that we have made provision for using delinquent taxes as an offset against any purchase price.

You will observe that we have included in our proposed legislation provisions for interstate cooperation with our neighboring states.

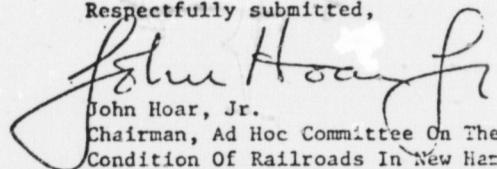
Our recommendations consider the recently enacted Regional Rail Reorganization Act of 1973 as well as the possibility of further Federal legislation. Through the above, the state would be the recipient and beneficiary of Federal funds and assistance.

The course successfully taken by our sister state, Vermont, over the past decade has served as a guide to our direction of thought.

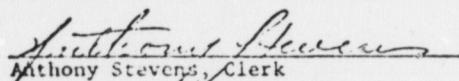
A railroad, as a public utility, has a duty and a responsibility to serve the public and we feel that with state ownership of rail properties the people and the state can insure such service.

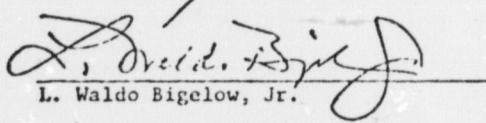
In closing this covering letter, we must point out a glaring error in the remarks of Benjamin Lacy, Trustee, Boston and Maine Railroad, at a luncheon in Concord on January 16, 1974, wherein he claimed that the railroad had installed some 350,000 ties and resurfaced and aligned some 400 miles of track in New Hampshire. Not only does the first figure represent about 1/3 of Boston & Maine's trackage in New Hampshire or 150 miles, if completely relaid; but physical observation of the system, together with maintenance figures provided by the Boston & Maine engineering department can account for no more than 1/10th of Mr. Lacy's statement of alledged maintenance and improvements.

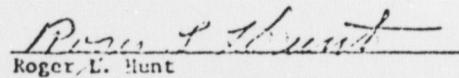
Respectfully submitted,


John Hoar, Jr.
Chairman, Ad Hoc Committee On The
Condition Of Railroads In New Hampshire

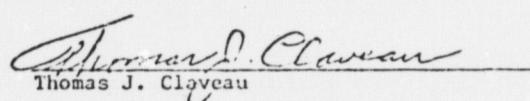
Representatives:


Anthony Stevens, Clerk


L. Waldo Bigelow, Jr.


Roger E. Hunt

Senator:


Thomas J. Cloveau

FINAL REPORT

**The Speaker's Ad Hoc Committee on the Condition
of Railroads in New Hampshire**

January 26, 1974

Rail service in New Hampshire is at a major turning point. Recent federal legislation dictates one of two possibilities for the state's rail lines: the reorganization of the Boston and Maine Railroad as a separate company, or the restructuring of the B & M system under a federally-sponsored rail corporation based in Philadelphia. If New Hampshire fails to respond to either outcome, it could lose rail service to two thirds of its total mileage - a severe blow to the state's economy.

At the same time, New Hampshire lies within reach of developing a thriving railroad system. If the state acts positively, it can create a strong, balanced transportation system that will save billions of gallons of fuel, secure a healthy economy, reduce unemployment, and provide for a cleaner environment. New Hampshire faces an opportunity to halt the railroads' endless cycle of declining service and abandonments, return the bulk of its track to regular service and maintenance, and upgrade its rail system to a level acceptable for passenger service.

No one else will do the job for us. The responsibility lies clearly in the lap of the legislature. Hence, the committee has submitted legislation to the special session that would grant authority to the Public Utilities Commission to purchase railroad track and rights-of-way and lease them to private operators. Keeping in mind New Hampshire's commitment to free enterprise and thrift, the committee offers this solution as the only reasonable alternative to policies allowing drastically reduced service or subsidized inefficiency.

Since World War II, the B & M Railroad, which operates two thirds of the state's trackage, has pursued a policy of curtailing service, deferring maintenance, diverting traffic, and discouraging shippers, receivers, and passengers until sparse freight traffic has given them grounds for abandonment. Once abandoned, the tracks have been ripped up the the rights-of-way segmented, making the old lines

impossible to recover. Of the 300 miles of N. H. track that has been abandoned and torn up between 1915 and 1968, none is likely to be restored without a major outlay of funds.

In the past five years, railroad companies have stepped up this process, applying for the abandonment of 224 miles of track in the state. From the skeleton of lines that remain, they continue to contemplate abandonments and reductions in service. In 1973, the B & M cut service on the line from Concord to Lebanon from 3 trains per week to 1 train per week. The B & M has already attempted to embargo this line this winter.

Despite claims to the contrary, they have put no regular maintenance into most of the state's lines for over ten years; rather they have worn the tracks down until they can no longer sustain efficient operation, destroying what was once a valuable resource of the state. In ten years, permissible track speeds have been cut in half throughout the state, increasing operating expenses, and making passenger service uncompetitive.

Recent federal railroad legislation could make the situation even worse. If the court decides the B & M is unreorganizable and offers its lines to the Philadelphia merger established by the act, the new corporation will operate only a fraction of the B & M system. This would leave perhaps two thirds of the state's rail mileage without an operator - an economically disastrous situation.

Many industries in New Hampshire simply cannot exist without rail service. In New Hampshire, at least 12,000 industrial jobs producing \$187 million and 5,000 farm-related jobs producing \$65 million are dependent on railroads. The loss of these jobs would cost state and local governments at least \$20 million in lost taxes and welfare payments. A loss of B & M service in N. H. would increase the prices of essential consumer goods 1%-5%, hiking fertilizer, grain, and feed prices much higher. New Hampshire farmers are already paying more in areas that have lost

rail services. Moreover, it would force more trucks on to our overburdened highways and retard the growth of high-wage industries in the state. As we have already seen, the lack of rail passenger service leaves the recreational industry at the mercy of fuel shortages. The people of New Hampshire simply can't afford the loss of rail service threatened by either the B & M's abandonment policy or a new conglomerate.

However, Congress has recently provided for branch lines threatened with abandonment. The railroad act enables states to subsidize losses or purchase and upgrade lines left out of its core system; for these purposes Washington will contribute 70 percent to the states' 30 per cent of the total cost.

The committee cannot accept subsidies as an answer; they provide too few checks on inefficiency, a serious problem among railroads today. Instead, the committee proposes that the Public Utilities Commission use available federal funds and state bonds to acquire and upgrade the state's railroad lines, which could then be leased to private operators at rates sufficient to recover the interest and principal of the bonds. To meet federal requirements, the committee's legislation would establish within the P.U.C. a rail office that would study the state's rail system and develop and administer a state plan.

The committee anticipates the purchase and lease of as many as four rail networks that could be operated profitably in the state. The rail office would create these networks from segments of light and heavy traffic density, being careful to give each network enough gateways to permit bargaining for divisions of revenue. The office would lease each network out on an all or nothing basis, requiring an operator to serve an entire network or no lines at all. Economic studies of these lines and first-hand observations indicate that each network could

be operated at a profit by the right operator. If properly structured, this network concept could return the bulk of the state's trackage to regular service and maintenance, and upgrade tracks to standards necessary for rail passenger service.

Vermont has used this method with remarkable success. In 1963, its Public Service Board purchased 180 miles of track abandoned by the bankrupt Rutland Railroad and leased segments to two short line operators. In the ten years since then, these two companies have provided regular service and maintenance on their lines, increased traffic by encouraging businesses to locate and expand along their lines, and largely paid the interest and principal of the state bonds used to purchase the lines. Hence, Vermont has acquired a tremendous asset to its economy at almost no net cost.

Short line operators would likely be major candidates to serve New Hampshire's rail networks, due to their substantial advantages over larger class I operators. First, because the operation is small, management and labor more readily come to mutually beneficial agreements, saving efficiency substantially. Secondly, because the short line has no commitment to main lines elsewhere, it can increase its profits only by pleasing and attracting customers in its own small area. Moreover, because management must live and work in the vicinity of the short line, it more readily understands and responds to the needs of its own customers. Thirdly, because the state owns the right-of-way, the short line pays no state property taxes on it. And finally, their state-owned track is eligible for federal disaster relief grants, unlike privately owned track. While seventy miles of New Hampshire track still has no rail service due to this year's floods alone, badly damaged Vermont track gained service back immediately due to the availability of disaster

aid for public properties.

However, while short-line operators have proven better at serving light density track, strong class I operators should not automatically be excluded from a new state system.

State ownership of track makes sense. Governments own and maintain highways, which are used for private purposes. Why shouldn't the state own its rail lines, which serve the same function as highways? The state can't lose. The purchase and lease policy would, like a toll road, pay off the bonds used to purchase the track. Moreover, if the plan did not work, the state could sell its lines at no loss. Unlike a subsidy plan, the state would be sinking its money into assets that could be recovered if necessary.

State ownership of track gives the public an option on rights-of-way now monopolized by private railroads. Instead of being stripped and segmented upon abandonment, these lines could be held until they become useful as transportation corridors. Moreover, state ownership is a potent bargaining card in obtaining service over light-density lines. Finally, state ownership removes the tremendous burden of investment required of most railroads and allows a company to concentrate on operations instead of indebtedness.

The committee feels that railroads and trucks should and can work together. One can compliment the other. Using innovative techniques, the two industries can cooperate to provide more economical, flexible, and customer-oriented service.

New Hampshire's railroads are in limbo. Most of its lines are teetering between sharply curtailed service and revitalization. The major decisions determining the future of its railroads will be made this year. If the legislature

fails to act this session, it will largely forfeit its chances to create the profitable rail system that is vital to the state's economy. Instead, it will leave the future of the state's railroads in the hands of a Philadelphia-based merger or a bankrupt railroad.

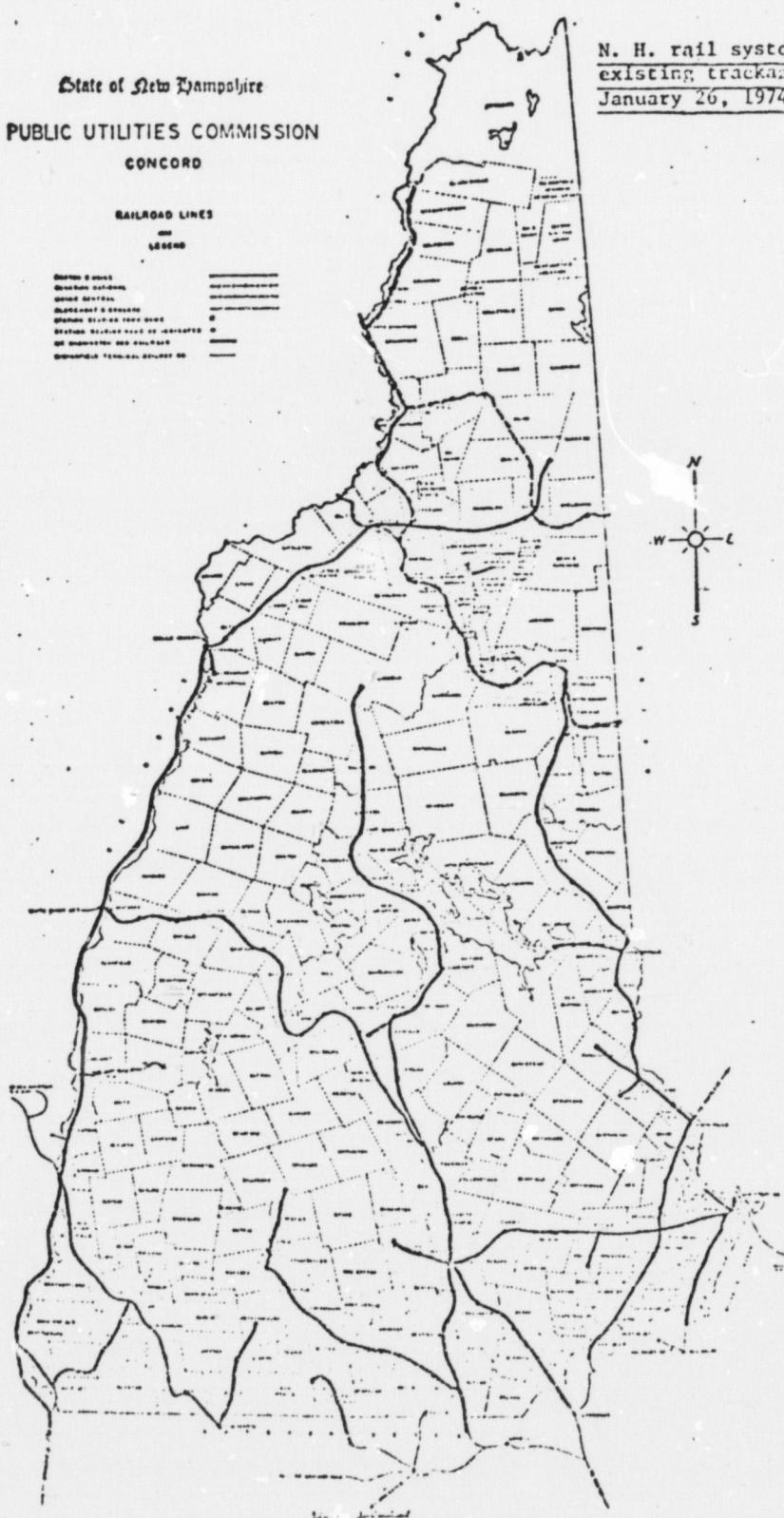
However, if it enacts the proposed legislation, it will place the state in a position to help return most of its lines to regular service and maintenance and upgrade track to a level acceptable for passenger service. It will give the state some control over a vital transportation facility without subsidies or state operation. And, by balancing the state's transportation system, it will take a strong step in the direction of economic stability, fuel conservation, environmental quality, public transportation, and a lower cost of living - all at little or no long run cost.

State of New Hampshire
PUBLIC UTILITIES COMMISSION
CONCORD

RAILROAD LINES
LEGEND

GENERAL RAILROAD
GENERAL NATIONAL
GENERAL MARITIME
GENERAL & OTHER
GENERAL STATE & TERRITORY
GENERAL SERVICE LINE OF NEW HAMPSHIRE
GENERAL FREIGHT AND CARGO
GENERAL TECHNICAL COMPANY CO.

N. H. rail system:
existing trackage
January 26, 1974



**State of New Hampshire
PUBLIC UTILITIES COMMISSION
CONCORD**

N. H. rail system
minus abandoned lines
and lines requested
for abandonment.
January 26, 1974

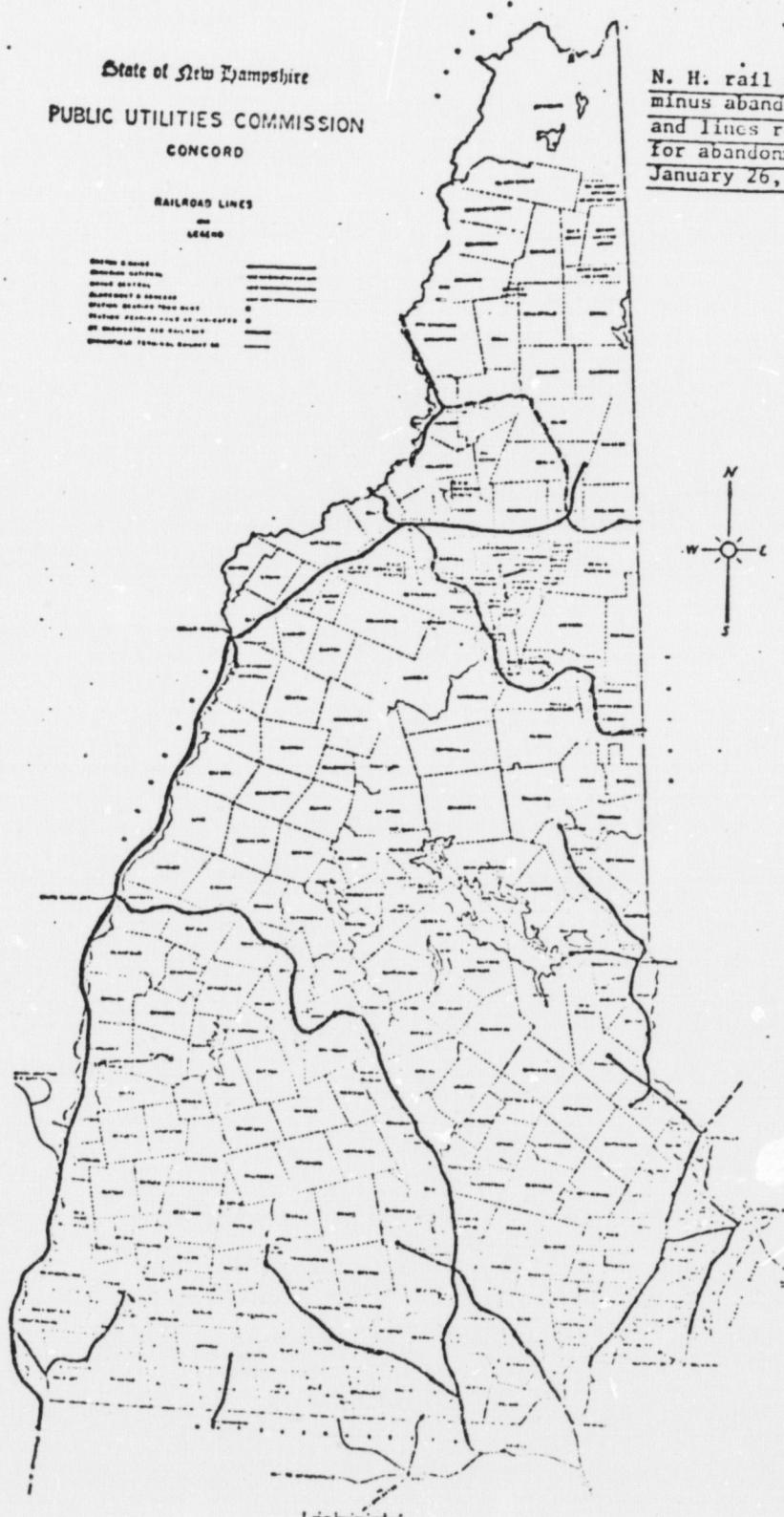
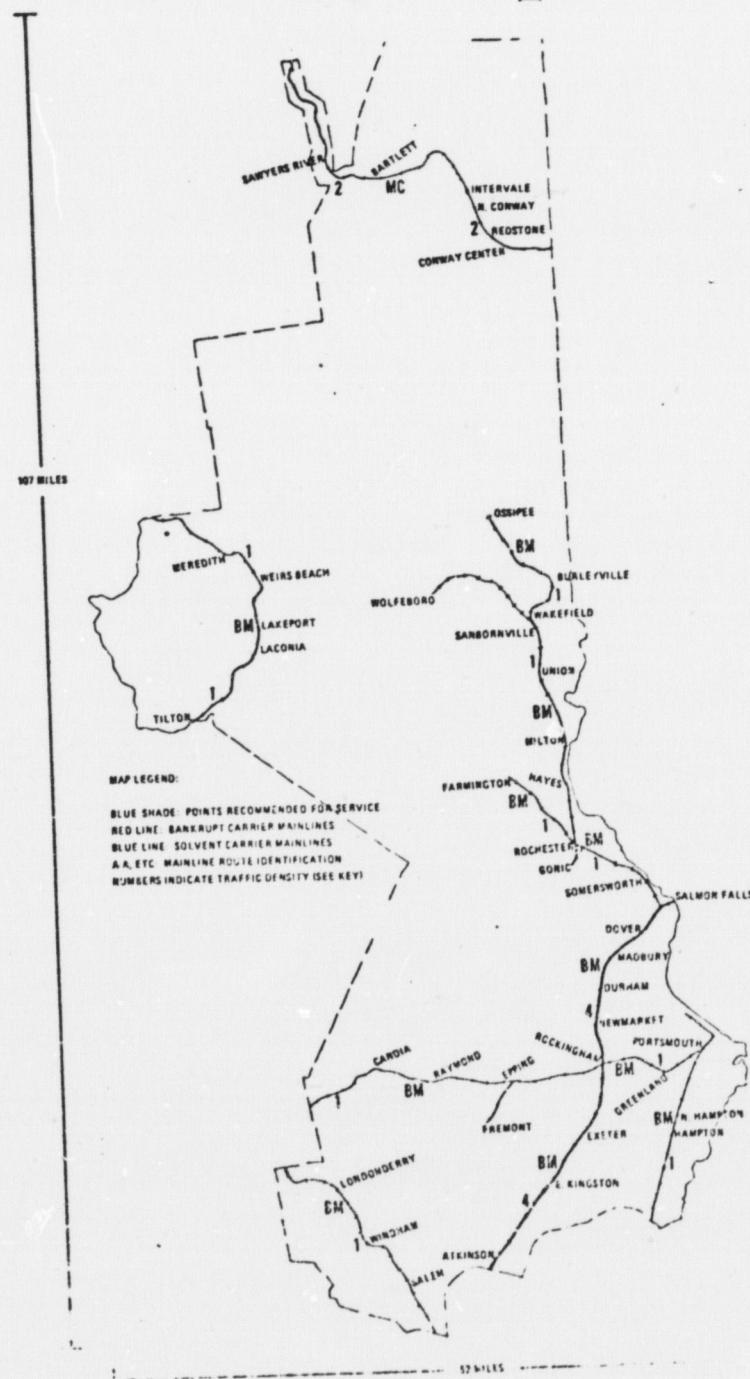


EXHIBIT B
ZONE 6 PORTSMOUTH, NH
POINTS RECOMMENDED FOR RAIL SERVICE



ZONE 6 PORTSMOUTH,NH

RAILROAD MAINLINES IN ZONE

<u>Line</u>	<u>Carrier</u>	<u>Route</u>
None		

POINTS RECOMMENDED FOR LOCAL RAIL SERVICE

Points listed are stations that originate and terminate sufficient traffic to require rail service.

<u>Station Name</u>	<u>Annual Carloads</u> ¹
Portsmouth	2,100
Dover	1,420
Exeter	380
Laconia	186
Meredith	161
Tilton	131

Traffic Summary

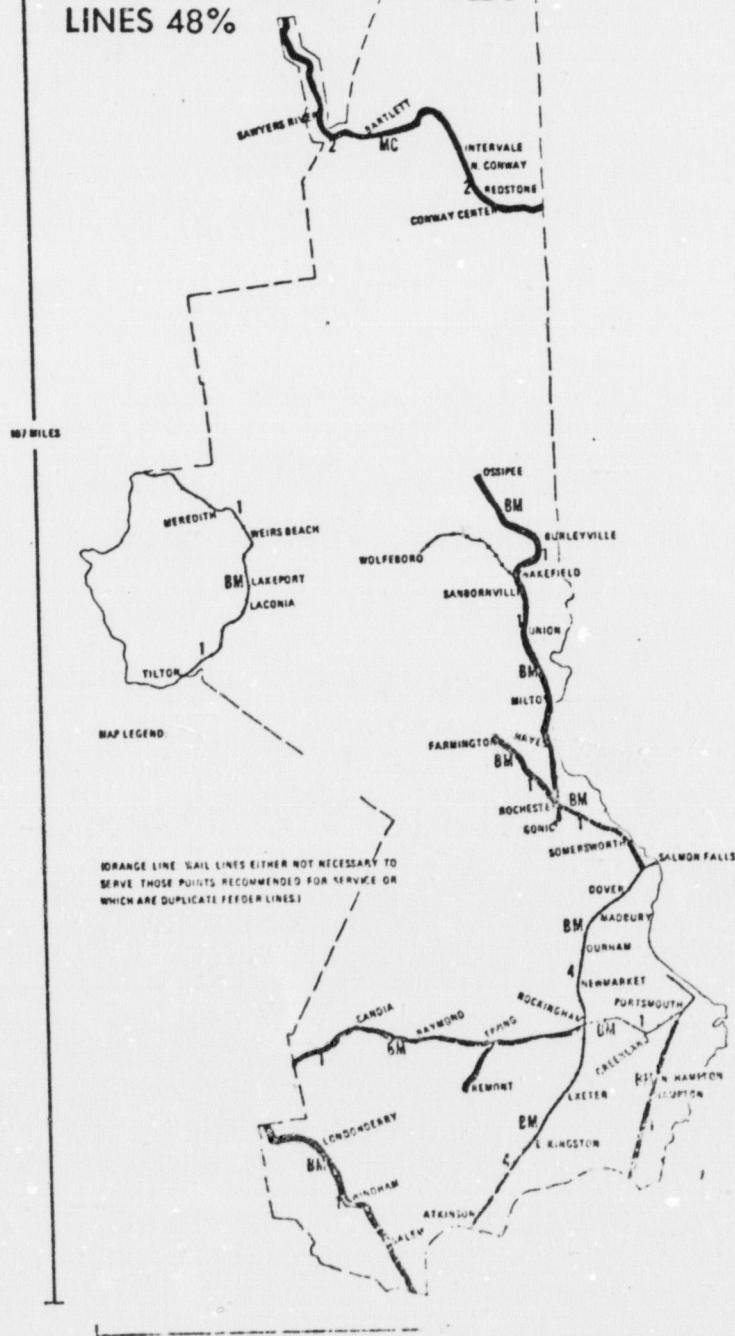
Total annual carloads in Zone: 3,466

Percent of traffic in zone recommended for service: 52%

¹Traffic carloads = total annual carloads

ZONE 6 PORTSMOUTH, NH

POTENTIALLY EXCESS RAIL LINES
MAXIMUM PERCENT OF ZONE TRAFFIC ON THESE
LINES 48%



ZONE 7 BERLIN, NH

Location: Northwestern New Hampshire

Population: 89,205¹

Area (sq. miles): 3,552¹

Interstate Highways: 89, 93

Railroad Service:

Bankrupt: Boston & Maine

Solvent: Grand Trunk, Maine Central

Rail Freight Originated and Terminated: ²

Carload per year: 21,897

Carloads per day: 60

Principal Commodity: ² Pulp and Paper Products

¹ 1970 Census of population

² 1972 Traffic data supplied by individual railroads

ZONE 7 BERLIN, NH

POINTS RECOMMENDED FOR RAIL SERVICE

MAP LEGEND:
BLUE SHADE POINTS RECOMMENDED FOR SERVICE
RED LINE: BANKRUPT CARRIER MAINLINES
BLUE LINE: SOLVENT CARRIER MAINLINES
AA, ETC: MAINLINE ROUTE IDENTIFICATION
NUMBERS INDICATE TRAFFIC DENSITY (SEE KEY)

120 MILES



120 MILES

ZONE 7 BERLIN,NH

RAILROAD MAINLINES IN ZONE

<u>Line</u>	<u>Carrier</u>	<u>Route</u>
None		

POINTS RECOMMENDED FOR LOCAL RAIL SERVICE

Points listed are stations that originate and terminate sufficient traffic to require rail service.

<u>Station Name</u>	<u>Annual Carloads</u> ¹
Berlin	12,758
Groveton	5,794
Westboro	590

Traffic Summary

Total annual carloads in Zone: 21,897

Percent of traffic in zone at stations recommended for service: 87%

¹Traffic data supplied by individual railroads

ZONE 7 BERLIN, NH

POTENTIALLY
EXCESS RAIL LINES
MAXIMUM PERCENT OF ZONE
TRAFFIC ON THESE LINES 13%

